

1990

# Jacks or Better to Open: Procedural Limitations on Co-Party and Third-Party Claims

Arthur F. Greenbaum

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## Recommended Citation

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# Jacks or Better to Open: Procedural Limitations on Co-Party and Third-Party Claims

Arthur F. Greenbaum\*

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## INTRODUCTION

On their face, the Federal Rules of Civil Procedure (the "Rules"), and state provisions modeled on them,<sup>1</sup> present a complex and seemingly contradictory approach to the pleading of claims in multi-party litigation. At times claims are compulsory while at other times they are permissive.<sup>2</sup> At times claims must have some relationship to the lawsuit as it has developed, while in other instances this relationship is not required.<sup>3</sup> Hid-

1. See generally Oakley & Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1378-1424 (1986) (surveying the influence of the Federal Rules on the procedural systems in state courts).

2. A pleader must raise compulsory claims or the pleader waives them and cannot assert them over objection in a subsequent proceeding. See, e.g., *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974). A pleader may raise permissive claims at its option. If the pleader decides not to raise a permissive claim in the initial proceeding, the claim still may be raised in a subsequent action. Compare FED. R. CIV. P. 13(a) (compulsory counterclaim) with FED. R. CIV. P. 13(b) (permissive counterclaim) and FED. R. CIV. P. 13(g) (permissive cross-claim) and FED. R. CIV. P. 14(a) (permissive impleader and related claims) and FED. R. CIV. P. 18(a) (permissive claim joinder).

3. Compare FED. R. CIV. P. 13(a) (requiring relationship with lawsuit for

den shifts in status alter a party's rights and responsibilities regarding the claims the party can or must allege.<sup>4</sup> Courts allow some claims although the Rules appear to make no provision for them.<sup>5</sup> Taken as a whole, the multi-claim provisions of the Federal Rules of Civil Procedure present a flawed framework for handling multi-claim litigation. At a minimum, the provisions need to be amended to clarify their requirements. More broadly, the time may be ripe for reconsidering the Rules as a whole.

Part I of this Article illustrates the complexity of the Federal Rules governing multi-party practice, and shows how the status of a party affects that party's ability to plead claims unrelated to the principal cause of action. Part II examines Federal Rules 13, 14, and 18, probing the ambiguous language of these rules, along with relevant court decisions, to determine the allowable claims each party to a case may bring. Part III describes how the Rules balance the policy objectives of party autonomy over the litigation and the concern for efficient use of judicial resources. Part IV argues that the ambiguities in the Rules can be resolved through amendment, and proposes several amendments that would clearly articulate the allowable claims for each party. The Article concludes that, beyond clarifying the Rules, the policy choices reflected in the Rules should be reconsidered, particularly in light of the variety of approaches currently in use by the states.

## I. AN OUTLINE OF THE RULES GOVERNING MULTI-CLAIM LITIGATION

Those Federal Rules of Civil Procedure that govern multi-claim litigation can be illustrated with a hypothetical involving construction litigation.<sup>6</sup> Assume that *A* is a major builder of of-

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compulsory counterclaim) and FED. R. CIV. P. 13(g) (requiring some relationship with lawsuit for cross-claim) and FED. R. CIV. P. 14 (requiring some relationship with lawsuit for impleader and claims between original plaintiff and third-party defendant) with FED. R. CIV. P. 13(b) (requiring no relationship with lawsuit for permissive counterclaim) and FED. R. CIV. P. 18 (allowing permissive joinder of claims unrelated to those previously pleaded in the lawsuit).

4. See *infra* Parts II. A., II. B. 1., III. E. 1., IV. A. 1.

5. See *infra* Parts II. B. 2., III. E. 2., IV. A. 2.

6. In any number of long-term, on-going business arrangements, the same parties often are involved in numerous separate transactions. This seems particularly true in the construction industry. Given the relationships involved, multi-claim litigation involving a number of separate incidents is not unlikely. See generally Currie, Stephenson & Beck, *The Owner Contemplat-*

fice buildings. In its dealings it often hires the same general contractor (B), who in turn hires the same subcontractors (one of whom is C), who deal with the same suppliers (one of whom is D). As is common in this type of enterprise, the parties have a certain amount of friction in their dealings, but usually resolve their differences informally. Upon a major falling out over a particular project, however, A decides to sue.

The Rules give A as plaintiff a great deal of freedom in structuring the lawsuit. Assuming A has potential rights to relief against each of the other participants arising out of their work on the building project, A can choose to sue one or more of them.<sup>7</sup> Assuming the parties are properly before the court,<sup>8</sup> the Rules allow A as plaintiff to assert any claim it has against any defendant, regardless of the relationship of the claims to each other, but the Rules do not require A to do so.<sup>9</sup>

Assume A as owner of the building sues B, the general contractor, and C, the subcontractor, for negligence and breach of contract.<sup>10</sup> A is considered an opposing party to B and

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*ing Litigation and Its Alternatives: An Overview*, in CONSTRUCTION LITIGATION: REPRESENTING THE OWNER § 1.3, at 5 (1984) (stating that "[t]he construction process generates an inordinate number of disputes and lawsuits . . . . [It] is inherent in the process."); Phillips, *Making the Complex Simple* in CONSTRUCTION LITIGATION: STRATEGIES AND TECHNIQUES § 1.3, at 7 (1989) (commenting that construction litigation almost always involves multiple claims among multiple parties).

7. See FED. R. CIV. P. 20(a). This rule allows, but does not require, joinder of defendants when at least one of the claims common to the defendants arises out of the same transaction or occurrence or series of transactions or occurrences and the claims have an issue of law or fact in common. *Id.*

8. For purposes of the hypothetical, assume that the court has subject matter jurisdiction over all the claims, territorial jurisdiction over all the parties, and is a place of appropriate venue. These concerns often significantly limit the otherwise broad joinder of claims allowed, particularly under Rule 18. See 3A J. MOORE, J. LUCAS & G. GROTHEER, JR., MOORE'S FEDERAL PRACTICE ¶ 18.07[1] (2d ed. 1989) [hereinafter MOORE'S FEDERAL PRACTICE]; 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1588 (2d ed. 1990) [hereinafter C. WRIGHT, A. MILLER & M. KANE,]; *infra* note 112.

9. FED. R. CIV. P. 18(a). Although the Rules themselves place no restriction or requirement on the plaintiff's joinder of claims, the doctrine of res judicata will, at times, encourage joinder of related claims. Under this doctrine, a defendant can plead res judicata as an affirmative defense in a subsequent action if the plaintiff seeks to raise claims that under the doctrine of res judicata should have been brought in an earlier suit. See *infra* text accompanying notes 158-61, 217-19.

10. See generally Grove & Blume, *Suing the Contractor for Construction Defects and Delays*, in CONSTRUCTION LITIGATION: REPRESENTING THE OWNER, § 3.3 (1984) (explaining the measure of damages recoverable from the general contractor for breach of contract); *id.* § 3.4 (discussing third-party beneficiary claims against subcontractors); *id.* § 3.8 (discussing negligence claims).

C.<sup>11</sup> Under the Rules, *B* and *C* may raise any claim they have against the plaintiff as a counterclaim,<sup>12</sup> regardless of the relationship of these new claims to the original claims raised by the plaintiff.<sup>13</sup> Further, with only a few exceptions, *B* and *C* must raise those claims they have against *A* that arise out of the same transaction or occurrence as the plaintiff's claim.<sup>14</sup> If either of the defendants asserts a claim against the plaintiff,<sup>15</sup> the plaintiff then becomes subject to the counterclaim rules as to that defendant and must raise by reply any compulsory counterclaims it has in response to the defendant's claims.<sup>16</sup>

To the extent *B* wishes to raise a claim against *C*, the Rules are more limiting. At this point in the litigation *B* and *C* are not "opposing parties." Rather, they are "co-parties."<sup>17</sup> The

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11. An "opposing party" under the Rules, as interpreted by case law, is one who has asserted a claim against another. See *infra* notes 47-49 and accompanying text. The claimant becomes an opposing party to the party sued. *Id.*

12. Rule 13(a) requires a pleader, in most circumstances, to bring any claim the pleader has against an opposing party "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." FED. R. CIV. P. 13(a). Rule 13(b) allows the pleader to bring any claim the pleader has against an opposing party "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." FED. R. CIV. P. 13(b). Thus, these rules together generally allow pleading of any counterclaim. Permissive counterclaims, however, must fall within the court's independent subject matter jurisdiction. See generally 3 W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 13.19[1] (2d ed. 1989) (discussing support for and criticism of requirement of independent jurisdictional grounds for permissive counterclaim); 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1422 (discussing requirement of independent jurisdictional grounds for permissive counterclaims).

13. See FED. R. CIV. P. 13(b).

14. Such counterclaims are compulsory unless 1) they have not matured at the time the responsive pleading is to be served; 2) they require for adjudication third parties over whom the court cannot acquire jurisdiction; 3) at the time of the action's commencement the claim is the subject of another pending action; or 4) the court lacks in personam jurisdiction over the party potentially subject to the compulsory counterclaim provision. See FED. R. CIV. P. 13(a).

15. Typical claims by a general contractor against an owner include claims for breach of contract, for failure to make contract payments, or for breach of an implied warranty of accuracy and sufficiency of the contract plans and specifications. See Currie, Stephenson & Beck, *supra* note 6, §§ 1.14-15. Also, subcontractors may have a claim against the owner for tortious interference with their business relationship. See, e.g., Gilbane Bldg. Co. v. Nemours Found., 606 F. Supp. 995, 1005-06 (D. Del. 1985).

16. See generally 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 13.08, at 13-42 to -43.

17. "Co-parties" are parties on the same side of the main litigation. See *infra* notes 48-49 and accompanying text. For a discussion of how this applies to co-plaintiffs, see *infra* note 45.

Rules label claims between co-parties "cross-claims."<sup>18</sup> Unlike opposing parties, co-parties, at least initially, are limited in the claims they can bring against each other to those that arise out of the transaction or occurrence that is the subject matter of either the original action, a counterclaim, or that relate to any property that is the subject matter of the original action, including a claim for liability over<sup>19</sup> against a co-party.<sup>20</sup> Once such a claim is brought, however, this restriction is satisfied and a co-party can bring any other claim it has against the other co-party, even if it is totally unrelated to the suit to date.<sup>21</sup> Thus, to get into the game, *B* must have a claim against *C* with a sufficient relationship to the suit as it has progressed. Once that claim is asserted, however, *B* then can raise claims arising from any other dealings the parties have had, even if they are totally unrelated to the particular building dispute that prompted the litigation.

Co-party status differs from opposing party status in another important way. Claims between co-parties always are permissive, while claims a pleader has against an opposing party often are compulsory.<sup>22</sup> Unlike permissive claims, compulsory claims are waived if not raised.<sup>23</sup>

Although in my hypothetical *B* and *C* initially are co-parties, once one brings a claim against the other, the claimant becomes an opposing party and all the rules pertaining to

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18. FED. R. CIV. P. 13(g).

19. *Id.* As used here, a claim for "liability over" is generally a claim for contribution or indemnification. See *infra* text accompanying notes 28-29; see also 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1446, at 361-63 (stating that impleader is proper when the third party is secondarily liable to the defendant based on indemnity, contribution, or any other like theory).

20. *Id.*

21. FED. R. CIV. P. 18(a). See *infra* Parts II. C., IV. A. 3. Thus, *B* might sue *C* for damages *B* suffered as a result of *C*'s malfeasance, or might seek indemnification or contribution from *C* for any liability *B* ultimately incurs in *A*'s suit against it. See Hoffman & Simmons, *Suing the Subcontractor and Material Supplier*, in CONSTRUCTION LITIGATION: REPRESENTING THE CONTRACTOR §§ 8.1, 8.8 (1986). Once such a claim has been asserted, nonrelated claims also may be joined. See *infra* notes 112-14 and accompanying text.

22. Compare FED. R. CIV. P. 13(g) (stating that co-party cross-claims are permissive) with FED. R. CIV. P. 13(a) (stating that transactionally related claims against an opposing party usually are compulsory). See also 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1431, at 236-37 (discussing distinctions between cross-claims under Rule 13(g) and counterclaims under Rule 13(a)).

23. FED. R. CIV. P. 13(a). See, e.g., *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974).

opposing parties apply.<sup>24</sup> Thus if *B* first raises a claim against *C*, *B* becomes an opposing party to *C*. *B*'s claims against *C* are governed by the rules pertaining to co-parties, while *C*'s claims against *B* are governed by the rules pertaining to claims against opposing parties. Had *C* acted first, their roles would be reversed.<sup>25</sup>

In connection with any of the counterclaims or cross-claims raised by the parties, nonparties outside the litigation that the claimant could have joined in the litigation if the claimant brought the claim as a plaintiff in an independent action, may be joined as co-defendants to the claim.<sup>26</sup> For example, if *B* cross-claims against *C* for negligence in carrying out its subcontract and believes that a supplier also was at fault in causing the problem at issue, *B* could bring that supplier in as a co-defendant to the cross-claim.

Finally, any party against whom a claim has been asserted can bring in by impleader a third-party "who is or may be liable to [that party] for all or part of the . . . claim" asserted against the party.<sup>27</sup> Although initially limited to claims for liability

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24. See *supra* notes 10-16 and accompanying text.

25. Although probably unintended, the shift from co-party to opposing party status may make an additional difference beside that discussed in the text. Rule 13(g) provides that a party may assert against a co-party a claim that the co-party "is or *may* be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant." FED. R. CIV. P. 13(g) (emphasis added). In short, a claim for contingent liability is permissible. See generally 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 14.08 (explaining how the same language in Rule 14 provides for the acceleration of the time at which a claim for liability, at present contingent, can be raised). The counterclaim rules, however, make no explicit provision for raising contingent claims and do not appear to allow them. See 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1446, at 374-75; see also 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 14.14 at 14-76 (stating that "the counterclaim procedure may not be available if a claim for contribution or indemnification is categorized as a contingent claim, and Rule 13 is construed narrowly to allow only matured claims").

If this interpretation is correct, then upon a cross-claim the sued co-defendant, by virtue of its shifting status, loses the ability to bring a contingent claim for liability over against the cross-claimant. To assert the claim at all, the sued co-defendant might need to sever the asserted cross-claim from the action, thereby resurrecting co-party status, which would allow assertion of the contingent claim. At that point the severed claim could be consolidated with the original action to allow the entire dispute to be resolved in one proceeding. Cf. *id.* ¶ 14.14, at 14-77 to 14-78 (describing a similar practice in the context of contingent liability claims by a defendant against a co-plaintiff); 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1446, at 375-76 (same).

26. FED. R. CIV. P. 13(h).

27. FED. R. CIV. P. 14(a). But cf. *infra* notes 84, 210 and accompanying

over, once a party asserts such a claim, the party then can raise any claims against the new party.<sup>28</sup> In my hypothetical, *B* or *C* might bring in *D*, the supplier, for indemnification or contribution in the event that *A* ultimately is successful in its claims against *B* or *C*.<sup>29</sup> Having raised the indemnification or contribution claim, *B* or *C* then could sue *D* for their own damages on this building project or any other dispute they may have with *D*.

*D*, then, is in an opposing party relationship with whichever party has asserted a claim against it, a co-party relationship with any other third-party defendants brought in for indemnification of the same claim, and is unaligned with respect to *A*, the owner of the building and the original plaintiff.<sup>30</sup> The Rules allow *D* to raise a claim against *A*, or *A* to raise a claim against *D*,<sup>31</sup> but only if the claim arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff — *A*'s claim against *B* as-

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text (addressing permissibility of impleader actions by co-parties seeking to pass on liability for cross-claims asserted against them).

28. FED. R. CIV. P. 18(a); see *infra* notes 112-14 and accompanying text.

29. See Bowers, *Suing the Material Supplier*, in CONSTRUCTION LITIGATION: REPRESENTING THE OWNER § 5.3, at 35-36 (Supp. 1986) (concerning impleading of suppliers by contractors).

In the usual case, claims for liability over against an outside party are raised through Rule 14 impleader. Whether this should be the case when the party seeking impleader also asserts cross-claims against existing parties arising out of the same transaction or occurrence that gives rise to the liability over claim is unclear. Perhaps under those circumstances it would be more appropriate to bring the third party in under Rule 13(h). Compare *Federman v. Empire Fire and Marine Ins. Co.*, 597 F.2d 798, 805-06 (2d Cir. 1979) (allowing new parties to be joined under Rule 13(h) for indemnity in connection with cross-claims for indemnity against existing co-defendants) with *Connell v. Bernstein-Macauley, Inc.*, 67 F.R.D. 111, 115-16 (S.D.N.Y. 1975) (rejecting use of Rule 13(h) in similar circumstances).

The device chosen may make a difference, because a party brought in under Rule 13(h) would become a co-party of the party sued under the cross-claim. If instead the party were impleaded by one of two co-defendants, the party would have a more limited relationship with the plaintiff, as defined by Rule 14, and would be unaligned with respect to the co-defendant of the third-party plaintiff. The limitations this situation presents for the assertion of claims between them is discussed *infra* text accompanying notes 35-36, 86-87, 189-93.

30. See 6 C. WRIGHT, A. MILLER, & M. KANE, *supra* note 8, § 1458, at 447-48.

31. FED. R. CIV. P. 14(a); see also Currie, Stephenson & Beck, *supra* note 6, at § 1.13 (discussing owner/supplier relationships); Brailsford, *Suing the Material Supplier*, in CONSTRUCTION LITIGATION: REPRESENTING THE OWNER §§ 5.2, 5.12-19 (1984) (describing claims available to owners against material suppliers).

suming *B* impleads *D*.<sup>32</sup> Once that threshold requirement is met, the claimant (*A* or *D*) can join any other claims it has against that opponent.<sup>33</sup> The claimant then becomes an opposing party to the person sued and the opposing party rules apply.<sup>34</sup>

The Rules are silent about the relationship of *D*, the third-party defendant, and the co-defendant of the third-party plaintiff. Thus, if *B* brings a third-party claim against *D*, the Rules do not address how to treat any claims that might exist between *C*, the co-defendant of the third-party plaintiff *B*, and *D*.<sup>35</sup> Substantial confusion exists over what claims, if any, should be permitted between *C* and *D*. If claims are permitted, there is additional confusion about what procedural devices govern them.<sup>36</sup>

In sum, whether a claim is permissive or compulsory and

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32. FED. R. CIV. P. 14(a).

33. FED. R. CIV. P. 18(a); see *infra* note 114 and accompanying text.

34. See *infra* text accompanying notes 78-79.

35. Because neither has yet asserted a claim against the other, *C* and *D* are not opposing parties and thus fall outside the counterclaim rules. Impleader under Rule 14 does not appear available to *C* because the Rule on its face applies only to parties outside the litigation, and *D* is now a party in the action, having been impleaded by *B*. But see *infra* notes 92-93 (citing cases that argue for allowing Rule 14 impleader between third-party defendants and a prior co-party). Although Rule 14 does authorize the third-party defendant to make certain claims, it is silent with respect to claims of this kind. Finally, the cross-claim rule is inapplicable because *C* and *D* do not meet the majority definition of co-parties — parties of equal status in opposition to a common claimant. See FED. R. CIV. P. 13(g); *infra* text accompanying note 48.

36. See *Paur v. Crookston Marine, Inc.*, 83 F.R.D. 466, 471-72 (D.N.D. 1979) (stating that co-defendant of third-party plaintiff cannot bring claim against third-party defendant); *Georgia Ports Auth. v. Construzioni Meccaniche Industriali Genovesi, S.P.A.*, 119 F.R.D. 693, 694-95 (S.D. Ga. 1988) (allowing co-defendant of third-party plaintiff to bring cross-claim against third-party defendant); *Hansen v. Shearson/Am. Express, Inc.*, 116 F.R.D. 246, 250-51 (E.D. Pa. 1987) (allowing co-defendant of third-party plaintiff to bring against third-party defendant a Rule 13(h) claim tied to a counterclaim in the action, despite the literal unavailability of Rule 13(h)); *American Gen. v. Equitable Gen.*, 87 F.R.D. 736, 738-39 (E.D. Va. 1980) (allowing claim of third-party defendant against a co-defendant of the third-party plaintiff, as long as the claim could have been brought as a separate action and consolidated with the instant case); *Malispina v. Farrah Mfg. Co.*, 21 Fed. R. Serv. 2d (Callaghan) 129, 129-30 (S.D.N.Y. 1975) (refusing to allow co-defendant of third-party plaintiff to bring against cross-claim third-party defendant, but assuming impleader would be available); *Murray v. Haverford Hosp. Corp.*, 278 F. Supp. 5, 7 (E.D. Pa. 1968) (same); *Fogel v. United Gas Improvement Co.*, 32 F.R.D. 202, 203-04 (E.D. Pa. 1963) (allowing co-defendant of third-party plaintiff to bring cross-claim against third-party defendant). See generally *infra* text accompanying notes 87-108, 189-93, 206-12 (discussing claims between co-defendants of the third-party plaintiff and the third-party defendant).

whether it requires some relationship to other claims already asserted,<sup>37</sup> or can be totally unrelated to other claims in the proceeding, turns on the relationship of the parties in the litigation at the time the claim is asserted. Claims by a party in response to a claim asserted against it are compulsory if they arise out of the transaction or occurrence that is the subject of the opposing party's claim; permissive if they do not, regardless of the setting in which the initial party's claim arose.

The Rules do not restrict claims between the original plaintiff and defendant; these claims need not be related to other claims in the lawsuit. The same is true for claims asserted by a party in response to a claim asserted against it. The Rules do restrict cross-claims, third-party claims and claims between the plaintiff and third-party defendants; these claims must have a relationship to the lawsuit. Once the pleader has asserted a qualifying claim,<sup>38</sup> however, the pleader may then

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37. The exact relationship of claims required varies by the type of claim asserted. A compulsory counterclaim must arise "out of the transaction or occurrence that is the subject matter of the opposing party's claim" and it must involve a claim that has matured at the time of its assertion. *See* FED. R. CIV. P. 13(a); 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1446, at 374-75 (stating that a counterclaim for contribution or indemnity is not available because the claim is contingent and has not yet matured). Cross-claims are broader, allowing assertion of a claim "arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action." FED. R. CIV. P. 13(g). This Rule also allows a co-party to bring a contingent claim against the other for liability over. *Id.* The third-party practice provisions of Rule 14 set different relational requirements in different settings. A defendant in response to a complaint, a plaintiff in response to a counterclaim, and a third-party defendant in response to a third-party complaint may assert a claim against an outside party "who is or may be liable to them for all or part of the claim asserted against them." FED. R. CIV. P. 14(a), (b). The impleaded party and the claimant may assert claims against each other if the claims arise out of the transaction or occurrence that is the subject matter of the claim, liability for which may be passed through to the impleaded party. *Id.*

A number of these provisions require that claims asserted must "[arise] out of the transaction or occurrence that is the subject matter" of a designated claim previously raised in the litigation. *See* FED. R. CIV. P. 13(a), 13(g), 14. Although this phrase is subject to a number of different interpretations and may vary in meaning depending on the rule involved, the preferred view is to read the phrase expansively and to construe it similarly in each of the provisions. *See* 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 13.13, at 13-64 to -68; 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1410, at 50, § 1431, at 237, § 1432, at 244; *see also* Robertson, *Joinder of Claims and Parties - Rules 13, 14, 17, and 18*, 52 MISS. L.J. 37, 51-55 (1982) (presenting a similar analysis in the context of the analogous Mississippi procedural rules).

38. By qualifying claim, I mean one that meets the restrictions of the particular rule involved.

join with it any claim, regardless of its relationship to the claims previously asserted in the action. In other words, restricted claims that a party would not be able to assert by themselves can be asserted after the party pleads a qualifying claim. Thus, much like in some forms of poker, the Rules require a qualifying claim to get in the game (jacks or better to open), but once that requirement is met the Rules allow the parties to play their hands as they wish.

## II. ON READING THE RULES

Although there is apparent consensus among courts and commentators that the Federal Rules of Civil Procedure work as I have described them,<sup>39</sup> the path to that conclusion is by no means clear, particularly to those who lack intimate familiarity with Rules 13, 14, and 18. Neither the meaning of the language in the Rules nor the logic underlying the varying treatment the Rules accord claims of differently aligned parties is immediately apparent. This section addresses the problems raised in interpreting the text of Rules 13, 14, and 18. The next section untangles the competing policies at work.

### A. RULE 13 — OPPOSING PARTIES VERSUS CO-PARTIES

Rule 13 splits the world into two groups, opposing parties and co-parties. Opposing parties are subject to the counterclaim rules.<sup>40</sup> With only a few exceptions, these rules require the pleading of claims one has against any opposing party if the claims arise out of the transaction or occurrence that is the subject matter of the opposing party's claim,<sup>41</sup> and allow the pleading of any other claim against the opposing party.<sup>42</sup> Counterclaims typically are raised by defendants against plaintiffs.<sup>43</sup>

Co-parties are subject to the cross-claim rule.<sup>44</sup> Such claims always are permissive and are limited to that those claims arise out of the transaction or occurrence that is the subject matter of either the original action or a counterclaim, or

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39. See *infra* notes 51, 79, 86, 112-114 and accompanying text.

40. FED. R. CIV. P. 13(a).

41. *Id.* See also *supra* note 14.

42. FED. R. CIV. P. 13(b).

43. Under the current interpretation of the Rules, however, *any* party against whom a claim is brought becomes an opposing party, despite the party's original status in the litigation. Because the Rules do not make this shift in status clear, some amendment is necessary. See *infra* Part IV. A. 1.

44. FED. R. CIV. P. 13(g).

that relate to any property that is the subject of the original action.<sup>45</sup> Cross-claims typically are raised between co-defendants.

Given these distinctions, a party failing to recognize the proper status of another party can be disadvantaged significantly. Wrongly perceiving another as an opposing party may lead a party to raise claims related to the litigation for fear that these claims are compulsory, when, if given a choice, the party would have withheld them. Further, such a party also might raise unrelated claims alone only to have the court dismiss them because co-parties are not allowed to raise unrelated claims without a valid cross-claim as an anchor. Of more concern is the party who does not realize that its opponent is an opposing party. Here, a party's failure to raise a related claim because of the mistaken belief that the claim is permissive can lead to waiver of the claim in subsequent litigation for failure to raise a compulsory counterclaim.<sup>46</sup>

As written, the counterclaim rules cover claims against an "opposing party," while the cross-claim rule speaks of claims against a "co-party."<sup>47</sup> Although the terms are not defined by the Rules themselves, an "opposing party" typically is defined as one who has asserted a claim against the prospective coun-

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45. *Id.* As written, Rule 13(g) allows a co-party to assert a cross-claim as long as the claim arises out of the transaction or occurrence that is the subject matter of either the original action or a counterclaim in the action. In short, as long as the claim arises out of the same basic controversy as the core dispute (the original claim and counterclaims) the Rule allows a cross-claim. See 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1432, at 250 (finding a narrower interpretation contrary to the "explicit and unqualified language of Rule 13(g)"). Some courts, however, give the language a narrower reading. For example, the Third Circuit, in *Danner v. Anskis*, 256 F.2d 123 (3d Cir. 1958), stated that:

The purpose of Rule 13(g) is to permit a defendant to state as a cross-claim a claim against a co-defendant growing out of the transaction or occurrence that is the subject matter of the original action or relating to any property that is the subject matter of that action, and to permit a plaintiff against whom a defendant has filed a counterclaim to state as a cross-claim against a co-plaintiff a claim growing out of the transaction or occurrence that is the subject matter of the counterclaim or relating to any property that is the subject matter of that counterclaim. . . . In other words, a cross-claim is intended to state a claim which is ancillary to a claim stated in a complaint of counterclaim which has previously been filed against the party stating the cross-claim.

*Id.* at 124. See also J. FRIEDENTHAL, M. KANE & A. MILLER, UNDERSTANDING CIVIL PROCEDURE § 6.8, at 358 (1985) (describing the *Danner* position as the general rule, at least with respect to claims by co-plaintiffs).

46. See, e.g., *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974).

47. Compare FED. R. CIV. P. 13(a), (b) (counterclaim rules) with FED. R. CIV. P. 13(g) (cross-claim provision).

terclaimant in the first instance. Co-parties are parties on the same side of the main litigation.<sup>48</sup> Thus, in our hypothetical in the preceding section, *A* is an opposing party to *B* and *C* because *A* has asserted a claim against them. *B* and *C* initially are co-parties to each other because they occupy the same status in the litigation and do not have any claims pending against each other.

One might read the Rules as freezing the status of the parties in time. Under this reading, *A* always will be an opposing party to *B* and *C*, and *B* and *C* always will be co-parties to each other, regardless of how the litigation proceeds.<sup>49</sup> As discussed later, strong policy arguments support this view.<sup>50</sup> Nevertheless, most courts and commentators read the Rules to incorporate a shifting status based on the actual posture of the parties.<sup>51</sup> Thus, if *B* brings a cross-claim against *C*, *B* then be-

48. See, e.g., *Augustin v. Mughal*, 521 F.2d 1215, 1216 (8th Cir. 1975); *Stahl v. Ohio River Co.*, 424 F.2d 52, 55 (3d Cir. 1970).

49. Language in some cases can be read to support this view. For example, in *Stahl* the court wrote:

Cross-claims are litigated by parties on the same side of the main litigation; counterclaims are litigated between opposing parties to the principal action.

424 F.2d at 55. More recently, a district court in Illinois, citing *Stahl*, commented:

By simple statutory definition, a cross-claim is a claim asserted against a co-party, e.g., a co-defendant, distinguishing it from a counterclaim which is brought against an opposing party, e.g., defendant versus plaintiff. In simpler terms, 'cross-claims are litigated by parties on the same side of the main litigation; counterclaims are litigated between opposing parties to the principal action.'

*United States v. American Centennial Ins. Co.*, No. 84 C 4645 (N.D. Ill. Oct. 31, 1985) (WESTLAW, Allfeds, at 5).

In construing its state provision, which mirrors the Federal Rules, the Vermont Supreme Court wrote:

A cross-claim differs from a counterclaim in that a counterclaim is available only to a defendant against a plaintiff, whereas a cross-claim is brought by a plaintiff against a co-plaintiff or by a defendant against a co-defendant.

*Associated Mortgage Investors v. Haystack Corp.*, 140 Vt. 125, 128, 435 A.2d 964, 965-66 (1981).

50. See *infra* Parts II. A. 3., III. E.1.

51. See, e.g., *Schwab v. Erie Lackawanna R.R.*, 438 F.2d 62, 66 (3d Cir. 1971); *James E. McFadden, Inc. v. Bechtel Power Corp.*, No. 85-6945 (E.D. Pa. Apr. 3) (WESTLAW, Allfeds, at 9-11), *aff'd* 806 F.2d 252 (3d Cir. 1986); *Chicago Freight Car Leasing Co. v. Martin Marietta Corp.*, 66 F.R.D. 400, 402 (N.D. Ill. 1975); see also 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 13.12[1], at 13-58, ¶ 13.34[1], at 13-209 to -210 (illustrating shifts in status); G. SHREVE & P. RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 58, at 227 (1989) (same). But cf. *Hall v. General Motors Corp.*, 647 F.2d 175, 184 (D.C. Cir. 1980) (stating that "an answering cross-claim *might* well be compulsory

comes an opposing party to *C* because they now are formally opposing each other on a claim.<sup>52</sup>

Several arguments have been advanced to support the view that the drafters of the Rules intended the status of the parties to shift with the pleading of a cross-claim. The history of Rule 13 provides some support for this interpretation. The interpretation is bolstered further by analogy to Rule 14, which like Rule 13(g), deals with claims for liability over. Because Rule 14 explicitly authorizes counterclaims in response to a claim for liability over, one might assume that the same should be true at least for cross-claims for liability over, if not more broadly.<sup>53</sup> Nevertheless, neither argument is conclusive and strong policy arguments support the contrary interpretation.<sup>54</sup> Each argument is addressed in turn.

### 1. The History of Rule 13

In the first public draft of Rule 13, the Rule defined counterclaims as claims that "the defendant has . . . against a plaintiff" to be raised in the "answer." The Rule defined cross-claims as "claims by one defendant against another."<sup>55</sup> This

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[as a counterclaim]," suggesting the issue is undecided) (emphasis added). State courts construing provisions similar to Rule 13 usually have adopted the federal interpretation. *See, e.g.,* *Miller v. LHKM*, 751 P.2d 1356, 1359-60 (Alaska 1988); *Mohr v. State Bank*, 241 Kan. 42, 51, 734 P.2d 1071, 1079 (1987); *Jorge Constr. Co. v. Weigel Excavating and Grading Co.*, 343 N.W.2d 439, 443 (Iowa 1984); *Ex parte Reliance Ins. Co.*, 404 So. 2d 610, 612-13 (Ala. 1981); *Ecker v. Clark*, 428 S.W.2d 620, 621 (Ky. 1968). *But see* *Jacobs v. Corley*, 732 S.W.2d 910, 914 (Mo. Ct. App. 1987) (finding that the parties' status does not shift upon assertion of a cross-claim).

52. The question of whether the parties' status shifts is important in several respects. If co-parties remain co-parties throughout the litigation, they will not be required to raise any claims they have against the other co-party because Rule 13(a) does not apply to co-parties. FED. R. CIV. P. 13(a). Co-parties are limited, however, in the claims they may raise initially to those with an appropriate relationship to the lawsuit. If, in contrast, party status shifts upon assertion of a cross-claim such that the claimant becomes an opposing party, the party responding to the claim is forced to raise most related claims against the claimant or they are waived. The claimant, however, is allowed to raise any claims even if they bear no transactional relationship to the other claims in the lawsuit. FED. R. CIV. P. 13(a), (b). *See supra* text accompanying notes 10-16.

53. *See, e.g.,* *Ecker v. Clark*, 428 S.W. 2d 620, 621 (Ky. 1968) (applying this line of reasoning to Rule 13(g)). *See also infra* Part II. A. 2. (comparing Rules 13 and 14).

54. *See infra* Parts II. A. 3., III. E. 1.

55. UNITED STATES SUPREME COURT ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF

language supports the view that counterclaims are between defendants and plaintiffs and cross-claims are between defendants, presumably without any change in status if a cross-claim is filed. Without explanation, the next and all subsequent drafts of the Rule use the "opposing party" and "co-party" language of the present Rule.<sup>56</sup>

In addition, these later drafts speak of raising counterclaims and cross-claims in "pleadings" rather than in the "answer."<sup>57</sup> The implications of this change become apparent upon analyzing Rule 7(a), which identifies the pleadings allowed under the Federal Rules. Under this provision, the response to a claim for relief, including that pleader's own claim for relief filed in response, usually is filed in an "answer."<sup>58</sup> If the counterclaim rules were limited to claims raised by defendants against plaintiffs, the term "answer" would be sufficient for purposes of Rule 13. Some claims for relief asserted by one who has been sued, however, are raised in pleadings other than an answer, such as a reply in response to a counterclaim and a third-party answer in response to a third-party complaint.<sup>59</sup>

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THE DISTRICT OF COLUMBIA Rule 18, at 32-33 (May 1936) (discussing Rule 18 language, now contained in Rule 13) [hereinafter 1936 Draft].

56. By the April 1937 draft, the counterclaim and cross-claim rules had been moved from Rule 18 to Rule 13 and changed to include the opposing party and co-party language. UNITED STATES SUPREME COURT ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PROPOSED RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES Rule 13, at 36-38 (April 1937) [hereinafter 1937 Draft]. The advisory committee notes accompanying the Rule make no mention of the change, nor was it discussed in the principal public debate preceding the adoption of the Rules. *See generally* 62 ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION Schedule D, at 705-07 (providing an extensive bibliography of articles on the Federal Rules of Civil Procedure prior to their adoption). A review of the proceedings of the highly influential Institutes on the Federal Rules sponsored by the American Bar Association in Cleveland, Washington and New York uncovered no direct reference to the change. *See* AMERICAN BAR ASSOCIATION, FEDERAL RULES OF CIVIL PROCEDURE AND PROCEEDINGS OF THE AMERICAN BAR ASSOCIATION INSTITUTE ON FEDERAL RULES 177-394 (1938) (reprinting proceedings of the institute held in Cleveland) [hereinafter Cleveland Institute]; AMERICAN BAR ASSOCIATION, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF THE SYMPOSIUM AT NEW YORK CITY (1939). I have not reviewed the private papers of the drafters on file in four law school libraries. *Compare* *Whalen v. Ford Motor Credit Co.*, 684 F.2d 272, 275, 281 (4th Cir.) (relying on the private papers of the Rules' drafters to interpret the Rules), *cert. denied*, 459 U.S. 910 (1982) *with id.* at 281-82 (Butzner, J., dissenting) (questioning the private papers' value as interpretive guides).

57. 1937 Draft, *supra* note 56, Rule 13.

58. The Rule provides that a party must respond to a complaint and a cross-claim in an answer. FED. R. CIV. P. 7(a).

59. *Id.*

Use of the broader term "pleading" as the vehicle for raising a counterclaim may have been intended to encompass these other devices as well, and to broaden generally the reach of the counterclaim provisions.<sup>60</sup>

Perhaps these changes in the Rules were intended to make the counterclaim provisions applicable to all parties responding to a claim asserted against them, but without explanation of the changes one cannot be sure. The changes may have been made to meet other, more limited concerns. For example, the change in the counterclaim rule also was accompanied by a change in the joinder of claims provision. As originally proposed, that rule stated in part:

A party may in one complaint or counterclaim state . . . as many different claims . . . as he may have against an opposing party.<sup>61</sup>

In subsequent drafts the rule provided:

The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim, may join . . . as many claims . . . as he may have against an opposing party . . . . There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.<sup>62</sup>

Taken together, these changes in the counterclaim and joinder of claims provisions might be no more than an attempt to alter specific practices under Equity Rule 30, the precursor to Federal Rule 13.<sup>63</sup> Equity Rule 30 defined counterclaims in equity as claims raised by the "defendant" against the "plaintiff" in an "answer." Under the Equity Rule, plaintiffs were not allowed to raise in a reply a counterclaim to a counterclaim.<sup>64</sup> The language changes in the counterclaim and joinder of claims rules may have been focused solely on changing this result, without any intention of addressing the possible changing status of co-parties subject to a cross-claim.

This narrow interpretation of the changes is supported further by the Advisory Committee Notes accompanying Rule

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60. See, e.g., *James E. McFadden, Inc. v. Bechtel Power Corp.*, No. 85-6945 (E.D. Pa. Apr. 3) (WESTLAW, Allfeds, at 9), *aff'd*, 806 F.2d 252 (4th Cir. 1986). Cf. *Miller v. LHKM*, 751 P.2d 1356, 1360 (Alaska 1988) (stressing use of term "pleading" rather than "answer" in state counterclaim rule that mirrors Federal Rule 13(a) in this regard); *Mohr v. State Bank*, 241 Kan. 42, 51, 734 P.2d 1071, 1079 (1987) (same).

61. 1936 Draft, *supra* note 55, Rule 25. The provision as amended now appears as Rule 18.

62. 1937 Draft, *supra* note 56, Rule 18(a).

63. FED. R. CIV. P. 13 original advisory committee note 1.

64. 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 13.03, at 13-24, ¶ 13.08, at 13-42 to -43.

13(a), which indicate that the Rule "is substantially former Equity Rule 30 . . . broadened to include legal as well as equitable counterclaims."<sup>65</sup> The Equity Rule provided for counterclaims by defendants against plaintiffs and did not speak to cross-claims, which had a different genesis.<sup>66</sup> Further, Equity Rule 30 was for the most part interpreted narrowly to speak only to claims by original defendants against plaintiffs.<sup>67</sup> Reference to Equity Rule 30 in the advisory committee note, without explaining that an expansion was intended, at best is misleading. It may even be read to support the view that co-parties do not change status and become opposing parties subject to the counterclaim rules, because that would not have occurred under the Equity Rule. In summary, although the counterclaim provisions in Rule 13 have been interpreted to apply to a co-party's claim raised in response to a cross-claim, the history of Rule 13 does not conclusively establish that the rule's drafters intended such a shift from co-party to opposing party status.<sup>68</sup>

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65. FED. R. CIV. P. 13 original advisory committee note 1.

66. 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 13.34[1], at 13-203 n.1 (surveying case law evolution of cross-claims in equity). *See generally* R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 139-42 (1952) (analyzing the right of defendants to assert cross-claims against co-defendants under code pleading).

67. 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶¶ 13.05, 13.08 (reporting that Equity Rule 30 was construed narrowly as unavailable for counterclaims by intervenors or by plaintiffs in response to counterclaims asserted against them).

68. Even if the history of the Rules does not address the question directly, the general thrust of the Rules may provide a guide. As Professor Resnik has observed, "[t]he 1938 Rules deliberately liberalized joinder practice; as the drafters discuss it, the idea was to permit a complete and thorough airing of a dispute and then to conclude it once and for all." Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 521 (1986). From this perspective, one might conclude that it is more likely that the drafters intended to enlarge the counterclaim provisions to incorporate the claims of one co-defendant sued by the other, as this would allow broader pleading through the permissive counterclaim provision and compel the pleading of related claims through the compulsory counterclaim provision. Doubt is cast on this, however, by the writing of Professor Dobie, a member of the advisory committee that drafted the Rules. In describing the counterclaim and cross-claim provisions he acknowledges that "Rule 13 makes generous and liberal provisions as to counterclaims and cross-claims, with the idea of settling in a single civil action the various claims of the parties." He still describes a counterclaim, however, as a claim "by a defendant against a plaintiff" and a cross-claim as a claim "by one defendant against a co-defendant," without ever mentioning a shift in status. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 267-68 (1939).

## 2. Rule 13 and the Rule 14 Analogy

Because both the cross-claim rule (Rule 13(g)) and the impleader rule (Rule 14) address actions for liability over, comparison of the language of each is instructive. The former rule applies when the claim is between co-parties, while the latter applies when the claim is between a current party already defending a claim and an outside party who will be brought into the action. Unlike Rule 13(g), Rule 14 specifically states that in response to the liability over claim, the third-party defendant "shall make . . . any counterclaims against the third-party plaintiff . . . as provided in Rule 13."<sup>69</sup> How this affects interpretation of the cross-claim provision of Rule 13(g), however, is not clear. One could argue that the drafters' failure to mention explicitly in Rule 13(g) that once sued, the co-party could raise counterclaims against the claimant, while doing so explicitly in Rule 14, suggests that a sued co-party does not acquire opposing party status in relation to the claimant. On the other hand, it is difficult to find a policy rationale to support different treatment. There appears to be no reason why a party subject to a liability over claim should be treated differently simply because in the one instance the party was in the litigation from the start, at the request of the plaintiff, while in the other it was brought in later, typically by a party other than the plaintiff.<sup>70</sup> Thus, affording counterclaim treatment to claims raised in response to a Rule 14 claim for liability over presents conflicting messages on the treatment of such claims in the cross-claim context.

## 3. A Contrary Approach

Although both the history of Rule 13 and the treatment of analogous claims under Rule 14 can be read to support the majority view that a co-party's status shifts once a claim is brought against it, this evidence is not conclusive. On a policy level, reading Rule 13 to freeze the parties in their initial alignment may better comport with the spirit of the Rules.

One policy concern underlying the Rules is a desire to avoid the inadvertent waiver of a claim resulting from a party's failure to plead it. For example, courts have given a flexible interpretation to the compulsory counterclaim rule, broadly in-

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69. FED. R. CIV. P. 14(a).

70. See *Ecker v. Clark*, 428 S.W.2d 620, 621 (Ky. 1968) (finding "no discernible reason" for treating Rule 13(g) and Rule 14 situations differently).

interpreting the "transaction and occurrence" language when a party affirmatively seeks to raise a counterclaim, but narrowly interpreting the language when a party is challenged for failure to raise a compulsory counterclaim in an earlier action.<sup>71</sup> Similarly here, given the substantial possibility that an original co-party may not be aware that status shift accompanies the filing of a cross-claim against it, it might be better to read Rule 13(a) narrowly and avoid the inadvertent loss of a claim.<sup>72</sup> Alternatively, in Section IV, this Article suggests ways the Rules can be amended to alert parties to the problem of shifting status.<sup>73</sup>

## B. RULE 14

As written, Rule 14(a) poses two major interpretive problems. First, the Rule is misleading with regard to what claims are allowed or required under third-party practice. Second, the Rule fails to address adequately the permissibility of third-party claims in complex settings.

### 1. Claims Allowed or Required Under Rule 14

In the simple case in which *A* sues *B* who impleads *C*, Rule 14 defines which claims each may raise against the other. *B*, referred to in the Rule as the third-party plaintiff, "may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff."<sup>74</sup> *C*, in turn, is instructed to raise any counterclaims it has against *B* and is allowed to assert any claims it has against *A*, provided the claims arise out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.<sup>75</sup> This same restriction applies to the plaintiff's claims against the third-party defendant.<sup>76</sup>

On its face, Rule 14 primarily authorizes limited claims. *B* is authorized only to bring claims for liability over against *C*. *C* then may bring any claims it has against *B* as counterclaims. *A* and *C* may each sue the other, but only if the claims they raise are transactionally related to the initial litigation between *A*

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71. See, e.g., *Aeroquip Corp. v. Chunn*, 526 F. Supp. 1259, 1262 (N.D. Ala. 1981); 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1410, at 79.

72. See *infra* Part III. E. 1. (discussing the policy implications from shifting status).

73. See *infra* notes 202-05 and accompanying text.

74. FED. R. CIV. P. 14(a).

75. *Id.*

76. *Id.*

and *B*. Further, with the exception of some claims between *C* and *B*, all of the claims are permissive.<sup>77</sup>

In reality, other principles alter this picture radically, although a party reading the text of Rule 14 would be unaware of them. As discussed earlier, the prevailing interpretation is that parties, regardless of their original status, become opposing parties once a claim has been asserted against them.<sup>78</sup> Thus, if *A* sues *C* or *C* sues *A*, the party who brought the claim becomes an opposing party and the counterclaim rules apply.<sup>79</sup> As discussed in the next section, the limitations on pleading particular kinds of claims is only a threshold requirement. Once it is met, any manner of claim may be brought against that party by operation of Rule 18.<sup>80</sup>

## 2. The Permissibility of Third-Party Claims in Complex Settings

In two major respects it is unclear how courts should apply Rule 14 in more complex settings. The Rule expressly authorizes impleader by a defending party in response to a claim by the plaintiff,<sup>81</sup> by a plaintiff in response to a counterclaim,<sup>82</sup> and by a third-party defendant in response to an "action against the third-party defendant."<sup>83</sup> The Rule is silent, however, about whether impleader can be raised by a co-party subject to a cross-claim. Whether the omission is intentional or an oversight is unclear.<sup>84</sup> The proper interpretation turns on the com-

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77. *Id.* Because *C* is instructed to bring counterclaims against *B*, those that fall within Rule 13(a) are compulsory. See FED. R. CIV. P. 13(a).

78. See *supra* notes 51-52 and accompanying text.

79. See, e.g., *Lindquist v. Quinones*, 79 F.R.D. 158, 161 (D. St. Croix 1978); 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 14.17, at 14-86; 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1404, at 20. But see *Developments in the Law — Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 975 (1958) [hereinafter *Developments*] (arguing that the parties can bring only compulsory counterclaims, not permissive counterclaims, in this context).

80. See *infra* notes 112-14 and accompanying text.

81. FED. R. CIV. P. 14(a).

82. FED. R. CIV. P. 14(b).

83. FED. R. CIV. P. 14(a). The degree to which impleader is available to the third-party defendant is unclear. By its language, the Rule allows liability over "for all or part of the claim made in the action against the third-party defendant." *Id.* (emphasis added). Perhaps use of the term "action" is meant broadly to encompass any claims raised against the third-party defendant in the proceeding. On the other hand, use of the limiting phrase "the claim" rather than a broader one, such as "any claims," may suggest impleader should be limited to those impleader claims of the third-party defendant arising out of the third-party claim raised against it.

84. Until 1966, the language of Rule 14(a) spoke of a "defendant" raising a

parative weight given to competing values at play in the multiple claims setting.<sup>85</sup>

Rule 14 extensively details the claims that can be asserted between third-party defendants and the third-party plaintiff, the original plaintiff, and any co-defendants the third-party defendant may have.<sup>86</sup> Rule 14 is silent, however, concerning how courts should treat claims between third-party defendants and co-defendants of the third-party plaintiff.<sup>87</sup> Although the Rule's silence can be read to disallow such claims, most courts find a way to hear them. The rationale for doing so, however, varies. Courts and commentators have articulated four different approaches to this problem.

Some courts treat the co-defendant of the third-party plaintiff and the third-party defendant as co-parties.<sup>88</sup> The co-par-

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third-party complaint for liability over concerning the "plaintiff's claim against him." FED. R. CIV. P. 14(a), 374 U.S. 865, 881 (1962). In 1966 the Rule was amended, without explanation, replacing the word "defendant" with the term "defending party." FED. R. CIV. P. 14(a). The phrase "defending party" standing alone could be read broadly to encompass anyone defending against a claim, including a sued co-defendant. Because the Rule retains the requirement that the defending party seek liability over from a claim against it by the plaintiff, however, this would not appear to be the case.

Professors Wright, Miller, and Kane write that "Rule 14 is available to any defending party." 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1442, at 293. Yet their subsequent text only mirrors the impleader provisions set forth explicitly in the Rule. *Id.*

85. See *infra* text accompanying notes 168-75, 208-12.

86. Yet another ambiguity arises here. Under Rule 14(a) the third-party defendant is allowed to raise any "cross-claims [it has] against other third-party defendants as provided in Rule 13." FED. R. CIV. P. 14(a). To the extent a third-party plaintiff impleads multiple third-party defendants for liability over on the same claim, the provision clearly applies. Suppose instead that two co-defendants in a suit each bring impleader claims against different third-party defendants. Whether cross-claims between the third-party defendants would be proper turns on whether they would be treated as co-parties within the meaning of Rule 13(g). See *Paur v. Crookston Marine, Inc.*, 83 F.R.D. 466, 471-72 (D.N.D. 1979) (disallowing a cross-claim under these circumstances).

87. For a brief discussion of these types of claims in a hypothetical case, see *supra* text accompanying notes 35-36.

88. Nowhere in the Rules is the term "co-party" defined. Most courts and commentators limit co-party treatment to parties having like status, such as co-defendants. See, e.g., *Stahl v. Ohio River Co.*, 424 F.2d 52, 55 (3d Cir. 1970). An original co-defendant and a third-party defendant have a different status and thus would not be co-parties. See *Hansen v. Shearson/Am. Express, Inc.*, 116 F.R.D. 246, 248-49 (E.D. Pa. 1987); *Paur v. Crookston Marine, Inc.*, 83 F.R.D. 466, 471-72 (D.N.D. 1979); *Murray v. Haverford Hosp. Corp.*, 278 F. Supp. 5, 6-7 (E.D. Pa. 1968); 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1431, at 238; see also text accompanying *supra* notes 48-49 (defining co-party).

To avoid this result, some courts have adopted differing definitions for what constitutes a co-party relationship. For example, in *Georgia Ports Au-*

ties' claims then are covered by Rule 13(g), allowing the parties to assert transactionally related claims, claims relating to the property of the action, and claims for liability over.<sup>89</sup>

Other courts treat the question as one of impleader. On its face, Rule 14 seems inapplicable because its language is limited to the assertion of claims for liability over against one "not a party to the action" who is brought in to defend.<sup>90</sup> Here, the third-party defendant already has been brought into the action.<sup>91</sup> To allow claims against parties already in a case, at least one court has read the phrase "party to the action" to mean party to the original action.<sup>92</sup> Other courts and commentators simply have assumed, without explaining, that impleader is available despite the fact that the third-party defendant already is a party.<sup>93</sup> Under this approach, impleading of the third-party defendant by one co-defendant has no bearing on the availability of impleader for the other.

Taking the impleader approach to the status of the co-defendant of the third-party plaintiff and the third-party defendant is more limiting than treating them as co-defendants. First, the only claim that can be asserted initially is one for impleader.<sup>94</sup> Second, this approach limits who can use the device. Although either party could initiate a cross-claim, the impleader claim is limited to the co-defendant of the third-party

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thority v. *Costruzioni Meccaniche Industriali Genovesi, S.P.A.*, 119 F.R.D. 693 (S.D. Ga. 1988), the court construed "co-party" to mean *any party that is not an opposing party*." *Id.* at 695 (emphasis in original). Claims between the co-defendant of the third-party plaintiff and the third-party defendant fall here. See also *Fogel v. United Gas Improvement Co.*, 32 F.R.D. 202, 204 (E.D. Pa. 1963) (defining a co-party as one "in conjunction" with another, which the court indicated would include the co-defendant of the third-party plaintiff/third-party defendant relationship).

89. See FED. R. CIV. P. 13(g).

90. See FED. R. CIV. P. 14(a).

91. See, e.g., *Georgia Ports Auth. v. Costruzioni Meccaniche Industriali Genovesi, S.P.A.*, 119 F.R.D. 693, 694 (S.D. Ga. 1988) (stating that co-defendant of third-party plaintiff cannot assert impleader claims against third-party defendant because third-party defendant already is a party to the action); *American Gen. v. Equitable Gen.*, 87 F.R.D. 736, 738 (E.D. Va. 1980) (stating that third-party defendant cannot assert impleader claim against co-defendant of third-party plaintiff because co-defendant already is a party to the action).

92. *Malaspina v. Farah Mfg. Co.*, 21 Fed. R. Serv. 2d (Callaghan) 129, 129-30 (S.D.N.Y. 1975).

93. See *Murray v. Haverford Hosp. Corp.*, 278 F. Supp. 5, 6 (E.D. Pa. 1968); 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1431, at 237-38; see also 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 14.14, at 14-75 to -77 (acknowledging that some courts allow Rule 14 impleader among those already parties).

94. 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1431, at 237-38.

plaintiff, because impleader is available only against one not a party to the original action and only the third-party defendant meets that criteria.<sup>95</sup>

Professors Wright, Miller, and Kane seem to endorse both approaches, treating the claim by the co-defendant of the third-party plaintiff against the third-party defendant as an impleader claim<sup>96</sup> and the claim by the third-party defendant against the co-defendant of the third-party plaintiff as a cross-claim.<sup>97</sup> Whatever logic may support this result,<sup>98</sup> it is difficult to square with the language of the Rules.<sup>99</sup>

A third approach, available in some circumstances, is to use

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95. See *Malaspina v. Farah Mfg. Co.*, 21 Fed. R. Serv. 2d (Callaghan) 129, 129-30 (S.D.N.Y. 1975). The *Malaspina* case may not be this limiting. In allowing the co-defendant of the third-party plaintiff to assert an impleader claim against the third-party defendant, the court stressed that the third-party defendant is not a party to the original action, only to the third-party action. *Id.* Because the co-defendant of the third-party plaintiff is a stranger to the third-party action, perhaps the third-party plaintiff should be able to bring that party into that hypothetically separate proceeding.

96. 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1431, at 237-38.

97. *Id.* § 1456, at 439-40. If a defendant were to bring a cross-claim against a co-defendant and join an additional party under Rule 13(h), the co-defendant sued and the party brought in would be co-parties subject to the cross-claim rule. Professors Wright and Miller argue that, by analogy, the same should be true for a party brought in under Rule 14. *Id.*

98. Assume again a situation in which *A* sues *B* and *C*, and *B* impleads *D*. *B* may implead *D* only if *B* has a claim for liability over, otherwise it could not bring *D* into the lawsuit except as a co-party to a counterclaim or cross-claim. See FED. R. CIV. P. 13(h), 14. To say that *C* cannot now bring a claim against *D* in the original action and must file a separate suit treats *C* unequally. Although both *B* and *C* start with an equal chance to implead *D*, once one acts, the other loses the right to do so. Not only does this seem unfair (why should *C* be treated differently than *B*), it also creates a race to file the first impleader action to preserve one's rights at the expense of the rights of others. See *Georgia Ports Auth. v. Construzioni Meccaniche Industriali Genovesi, S.P.A.*, 119 F.R.D. 693, 694-95 (S.D. Ga. 1988); *infra* notes 191-92 and accompanying text.

When focusing on the right of the third-party defendant to sue the co-defendant of the third-party plaintiff, recourse to the cross-claim rule seems appropriate. Had *B* raised a cross-claim against *C* and desired to implead *D*, *B* might have brought *D* in under Rule 13(h). FED. R. CIV. P. 13(h). In those circumstances, *C* and *D* would be considered co-parties and would be free to raise cross-claims against each other. FED. R. CIV. P. 13(g). From *D*'s perspective the device used to bring it into the litigation in no way affects its relationship to *C*. Therefore, *D* should have the same rights against *C* in either circumstance. See *supra* note 97.

99. Rule 14(a) specifically provides that the third-party defendant "shall make any . . . cross-claims against other third-party defendants as provided in Rule 13," thereby implying that a "co-party" is one of like status, which the co-defendant of the third-party plaintiff is not. FED. R. CIV. P. 14(a).

Rule 13(h).<sup>100</sup> This provision provides that "[p]ersons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with [the party joinder rules]."<sup>101</sup> Under one interpretation, Rule 13(h) is limited to situations when a party attempts to bring outside parties into the proceeding; it thus would have no applicability to claims involving the third-party defendant and the co-party of the third-party plaintiff, because both are already in the proceeding.<sup>102</sup> Others, however, have stretched the Rule to reach claims between the third-party defendant and the co-defendant in the original action if the asserted claim is tied sufficiently to a proper counterclaim or cross-claim in the suit.<sup>103</sup>

Finally, some courts require that any claim between the co-defendant of the third-party plaintiff and the third-party defendant be brought as a separate action, which then might be consolidated with the initial suit.<sup>104</sup> Alternatively, the court could sever the existing third-party claim, freeing the scene for the co-defendant to assert an indemnity claim against the common third-party defendant, and then reconsolidate the action.<sup>105</sup> The unnecessary circuitry these approaches require lies behind the movement by some courts to read the Rules creatively to allow the claims as cross-claims, third-party claims, or Rule 13(h) claims.<sup>106</sup> The logic of creatively reading the Rules

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100. See, e.g., *Hansen v. Shearson/Am. Express, Inc.*, 116 F.R.D. 246, 250-51 (E.D. Pa. 1987).

101. FED. R. CIV. P. 13(h).

102. See generally 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1435, at 272 (stating that "[a] person cannot be made an additional party under Rule 13(h) if he already is a party to the action").

103. See, e.g., *Hansen*, 116 F.R.D. at 250-51; cf. *supra* notes 29, 98 (discussing the interplay of impleader and Rule 13(h)); 3 MOORE'S FEDERAL PRACTICE, *supra* note 13, ¶ 14.17, at 14-85 n.4 (suggesting that Rule 13(h) might be used by a third-party defendant against a plaintiff even though the plaintiff is already in the litigation).

104. See *American Gen. v. Equitable Gen.*, 87 F.R.D. 736, 738-39 (E.D. Va. 1980) (discussing this possibility in dicta).

105. See, e.g., *Georgia Ports Auth. v. Construzioni Meccaniche Industriali Genovesi, S.P.A.*, 119 F.R.D. 693, 695 n.2 (S.D. Ga. 1988). See generally 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 14.14, at 14-77 to -78 (describing this procedure); 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1446, at 375-76 (same).

106. See, e.g., *Georgia Ports Auth.*, 119 F.R.D. at 695 (stating that in light of the admonition of Federal Rule 1 to construe the Rules "to secure the just, speedy, and inexpensive determination of every action," the cross-claim rule should be read to encompass claims by a co-defendant of the third-party plaintiff against the third-party defendant to avoid requiring the filing of an independent action to be consolidated); *Hansen v. Shearson/Am. Express, Inc.*, 116 F.R.D. 246, 250 (E.D. Pa. 1987) (relying on Rule 1 to construe Rule 13(h) to

to allow directly what otherwise can be accomplished only indirectly makes sense, however, only when the more complicated alternative in fact is available.<sup>107</sup> For example, if an independent action subject to consolidation would not lie because of subject matter jurisdiction, territorial jurisdiction, or venue concerns, reading the Rules to permit a party to assert the claim in the original action does more than simply allow the same result more easily. Reading the Rules to allow a party to assert the claim still may be justified, but an independent rationale would be necessary to do so. Ultimately, choosing among these four approaches is a matter of policy. The policies at work here and the proper trade-off among them are discussed in Section III.<sup>108</sup>

### C. RULE 18(a)

On first reading, Rule 18(a) is unassuming. It provides:

A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.<sup>109</sup>

On its face this Rule is subject to at least two interpretations. The Rule can be read to mean that depending on a party's status in the litigation, that party may bring together as many claims as it has arising from that status.<sup>110</sup> For example,

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allow a claim by a third-party defendant against a co-defendant of the third-party plaintiff to be brought in connection with a counterclaim against the third-party plaintiff); *American Gen.*, 87 F.R.D. at 738-39 (reading the Rules broadly in light of Federal Rule 1 to allow a claim by a third-party defendant against the co-defendant of the third-party plaintiff, rather than requiring the filing of an independent action and a request for consolidation). *See generally* 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1446, at 376 (stating that in light of Rule 1, "there is much to be said for . . . simply allow[ing] impleader as an initial matter without going through the ritual of severance followed by impleader and consolidation").

107. For example, in *American General v. Equitable General*, 87 F.R.D. 736 (E.D. Va. 1980), the court allowed a third-party defendant to bring a claim against a co-party of the third-party plaintiff, rather than requiring the parties to bring a separate action to be consolidated with the original, but noted:

Had the movants alleged that there was a lack of complete diversity between [the parties], or that [the complainant] could not have obtained service of process over the movants, the movants clearly would have been prejudiced by allowing the cross-claims to stand. Under such circumstances, the Court would not have hesitated to grant the motion to dismiss.

*Id.* at 738.

108. *See infra* text accompanying notes 189-93.

109. FED. R. CIV. P. 18(a).

110. *Cf. Schwab v. Erie Lackawanna R.R.*, 438 F.2d 62, 68 (3d Cir. 1971)

co-parties would be allowed to bring only claims meeting the cross-claim rule against other co-parties. Under this interpretation, a co-party could join together as many qualifying cross-claims as it has against another party, but it could not bring with them a claim that would not meet the cross-claim provision of Rule 13(g). The same kind of limitation would be true for impleader claims and claims between plaintiffs and third-party defendants under Rule 14, because the language of Rule 14, without the aid of Rule 18, restricts the allowable claims.<sup>111</sup> The fact that these Rules themselves say nothing about allowing pleading of non-qualifying claims with qualifying claims lends credence to this interpretation. Although this interpretation seems quite sensible, most courts and commentators have given Rule 18 a broader meaning, reading the Rule to allow a party to raise any claim against another party after raising a qualifying claim.<sup>112</sup> In other words, if a co-party has a claim that meets the cross-claim rule, the co-party may plead along with it any claims it has against the other co-party, no matter how unrelated.<sup>113</sup> Similarly, parties initially limited under Rule 14 may raise any claim whatsoever once they assert a qualifying claim under Rule 14.<sup>114</sup>

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(recognizing this as a possible interpretation of Rule 18, as applied in the impleader context, but adopting the broader view that any claim can be brought once a qualifying claim is asserted).

111. FED. R. CIV. P. 14(a); *see also supra* text accompanying notes 27-34, 74-80 (discussing operation of Rule 14(a)).

112. Although the Rules allow pleading of such claims, they do not purport to speak to the courts' subject matter jurisdiction to hear them. *See* FED. R. CIV. P. 82. To be heard, the claims must be supported by independent or ancillary subject matter jurisdiction. Ancillary jurisdiction will not be available if the claims fail to share a sufficiently close relationship with anchor claims in the litigation. *See* 3A MOORE'S FEDERAL PRACTICE, *supra* note 8, ¶ 18.07, at 18-22 to -23; 6A C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1588, at 538. *See generally* Matasar, *A Pendent and Ancillary Jurisdiction Primer: The Scope and Limits of Supplemental Jurisdiction*, 17 U.C. DAVIS L. REV. 103 (1983) (discussing the scope of pendent and ancillary jurisdiction).

113. *E.g.*, *First Nat'l Bank v. Pepper*, 454 F.2d 626, 635 (2d Cir. 1972); *see also* J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 45, § 6.8, at 358 n.13 (recognizing that once a transactionally related claim is asserted, parties may join any additional claims against their co-parties); 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 13.40, at 13-241, ¶ 18.04[4], at 18-19 n.4 (recognizing that diverse and unrelated cross-claims can be joined under Rule 18(a)).

114. *See* *Schwab v. Erie Lackawanna R.R.*, 438 F.2d at 68-70; *FDIC v. Linn*, 671 F. Supp. 547, 563 (N.D. Ill. 1987); *Whicker v. CONRAIL*, No. 85 C 6137 (N.D. Ill. Aug. 12, 1987) (WESTLAW, Allfeds, at 5-6); *Prudential Ins. Co. v. BMC Indus.*, 113 F.R.D. 100, 103 (S.D.N.Y. 1986); *United of Omaha Life Ins. Co. v. Reed*, 649 F. Supp. 837, 842 (D. Kan. 1986); *Executive Fin. Servs. v. Heart Chec, Inc.*, 95 F.R.D. 383, 384 (D. Colo. 1982); *North Am. Corp. v. Halli-*

This result, if not compelled by the language of the Rule itself, appears to be the one intended by the drafters. Prior to 1966, Rule 18 stated:

The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternative claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.<sup>115</sup>

It appears that most courts interpreted the last sentence as a limitation on the kinds of claims that could be joined.<sup>116</sup>

In 1966, Rule 18(a) was amended to its present form. The primary impetus for change came from limitations read into the Rule by some courts in situations involving claims against multiple parties.<sup>117</sup> In response, the language incorporating the

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burton Co., 71 F.R.D. 521, 522 (W.D. Okla. 1976); 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 13.06[3], at 13-36, ¶ 18.04[4], at 18-19; 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1452, at 414. *But see* de Haas v. Empire Petroleum Co., 286 F. Supp. 809, 815 (D. Colo. 1968) (denying joinder of additional claims to impleader claim without mentioning Rule 18(a)), *aff'd on other grounds*, 435 F.2d 1223 (10th Cir. 1970).

A few courts acknowledge that Rule 18(a) allows joinder of non-qualifying claims to claims qualifying under Rule 14, but appear to limit the non-qualifying claims to ones transactionally related to the litigation. They do so apparently by importing ancillary jurisdiction limitations into the reading of the Rules themselves, even when ancillary jurisdiction is not itself an issue, such as when the non-qualifying claims were supported by independent subject matter jurisdiction. *See, e.g.*, E. F. Hutton Credit Corp. v. Lawrence L. Gipson, M.D. Assocs., 36 Fed. R. Serv. 2d (Callaghan) 896, 900 (W.D. Pa. 1983); Stiber v. United States, 60 F.R.D. 668, 670 (E.D. Pa. 1973).

State courts, construing similar provisions, usually have adopted the prevailing federal interpretation. *See* Middlesex Mut. Assurance Co. v. Black, 40 Conn. Supp. 63, 65, 480 A.2d 614, 616 (Conn. Super. Ct. 1984); Falcon Tankers, Inc. v. Litton Sys., Inc., 300 A.2d 231, 240 (Del. Super. Ct. 1972); Cohen v. McLaughlin, 250 Ga. 661, 662-63, 301 S.E.2d 37, 39-40 (1983); State *ex rel* Jacobs v. Municipal Court, 30 Ohio St. 2d 239, 243, 284 N.E.2d 584, 587 (1972); *cf.* Atlas Ltd. v. Kingman Warehouse Co., 357 N.W.2d 584, 586-87 (Iowa 1984) (allowing joinder without reference to a provision similar to Rule 18(a)); Roebuck v. Steuart, 76 Md. App. 298, 320-22, 544 A.2d 808, 818-19 (1988) (allowing joinder despite the silence of the State's joinder of claims provision concerning impleader claims).

115. FED. R. CIV. P. 18(a), 308 U.S. 25 (1939).

116. *Cf.* Schwab v. Erie Lackawanna R.R., 438 F.2d 62, 68 (3d Cir. 1971) (noting that before the 1966 amendment to Rule 18 the vast weight of authority held that a third-party plaintiff could not join together claims other than those for liability over, but that after the amendment such joinder was allowed).

117. FED. R. CIV. P. 18 advisory committee note (1966).

multi-party rules was eliminated.<sup>118</sup> Little noticed in the commentary at the time was the change in language pertaining to cross-claims and impleader claims.<sup>119</sup> Although this change might simply be one of style, the advisory committee note, albeit cryptically, suggests otherwise. It provides in part:

Rule 18(a) is now amended not only to overcome the Christianson decision and similar authority [concerning the interaction of the joinder of claims and joinder of parties rules], but also to state clearly, as a comprehensive proposition, that a party asserting a claim (an original claim, counterclaim, cross-claim, or third-party claim) may join as many claims as he has against an opposing party.<sup>120</sup>

The advisory committee note cited two cases that address whether a third-party plaintiff could join a related claim for direct relief to an impleader claim under Rule 14.<sup>121</sup> *Noland Co. v. Graver Tank & Mfg. Co.*,<sup>122</sup> which is cited with approval, allowed joinder, but *Humphrey v. Security Aluminum Co.*,<sup>123</sup> which garnered a "but cf." cite,<sup>124</sup> did not and the latter was the majority rule.<sup>125</sup> Citation of these cases in this context seems to indicate the drafters' desire to allow the appending of non-qualifying claims to qualifying claims under Rule 18.<sup>126</sup> The overwhelming majority of cases and commentators concur.<sup>127</sup>

In summary, like Rules 13 and 14, Rule 18 as written is ambiguous. Unfortunately, these ambiguities make it difficult for parties engaged in multi-claim litigation to always know their rights and duties under the Rules. Beyond the language problems, these provisions reflect policy compromises embedded in the Federal Rules that are open to question. These policy compromises are discussed in the next section.

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* (the citation read: "See *Noland Co., Inc. v. Graver Tank & Mfg. Co.*, 301 F.2d 43, 49-51 (4th Cir. 1962); but cf. *C. W. Humphrey Co. v. Security Alum. Co.*, 31 F.R.D. 41 (E.D. Mich. 1962)").

122. 301 F.2d 43 (4th Cir. 1962).

123. 31 F.R.D. 41 (E.D. Mich. 1962).

124. See *supra* note 121.

125. See *Schwab v. Erie Lackawanna R.R.*, 438 F.2d at 68 (canvassing the relevant case law).

126. See Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)*, 81 HARV. L. REV. 591, 595-97 (1968) (comments by the reporter for the 1966 amendments to the Federal Rules, indicating that this reading was intended).

127. See *supra* notes 113-14.

### III. CONFLICTING POLICIES AND RESULTING COMPROMISES

As described above, depending on context a claim may be compulsory or permissive, and may require a qualifying relationship to the lawsuit. This variable treatment arises from the policy choices and compromises inherent in the Federal Rules.

In general, the Rules reflect the interplay and accommodation of several sometimes conflicting policies. Overall, the Rules attempt to balance the rights of litigants to control their own cases against the systemic desire to process claims efficiently.<sup>128</sup> In the search for efficiency, the Rules seek to encourage pleading of multiple claims in a single proceeding, while avoiding the inefficiency and complexity occasioned by multi-claim litigation.<sup>129</sup> More specifically, the conflicting policies the Rules seek to accommodate include furthering the litigants' control over how the litigation proceeds, encouraging efficiency by resolving entire controversies in one suit, preserving the plaintiff's proprietary interest in the litigation, and ensuring that all litigants are treated fairly. In the sections below, I describe these different policy considerations and their implications for the rules governing multi-claim litigation.

#### A. LITIGANT CONTROL

The Rules and related doctrines attempt to provide litigants a substantial amount of freedom concerning whether to sue, the forum in which the litigation will occur, the parties that will be involved, and the claims to be asserted. This notion that a litigant should have substantial control over its claim has a long history.<sup>130</sup>

This freedom, however, is not unfettered. Statutes of limitations limit when one may sue. Subject matter jurisdiction,

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128. Cf. AMERICAN LAW INSTITUTE, PRELIMINARY STUDY OF COMPLEX LITIGATION 25-31 (1987) [hereinafter A.L.I., PRELIMINARY STUDY] (discussing this tension in the context of complex litigation); AMERICAN LAW INSTITUTE, COMPLEX LITIGATION PROJECT 25 (Tent. Draft No. 1, 1989) [hereinafter A.L.I., COMPLEX LITIGATION PROJECT] (same); Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 779-80 (1985) (same).

129. See G. SHREVE & P. RAVEN-HANSEN, *supra* note 51, § 55[B] - [B][1] (recognizing this tension).

130. See, e.g., R. MILLAR, *supra* note 66, at 137 (tracing the notion to Roman and Germanic law as captured in the maxim *invitus agere nemo cogatur* — no one is forced to act unwillingly); cf. Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 561, 565-66 (1987) (citing the common law tradition of individual justice as the source of antipathy toward class actions that thwart individual control).

personal jurisdiction, venue, and change of venue doctrines all limit forum choice.<sup>131</sup> Party rules circumscribe who may be joined and dictate who must be joined.<sup>132</sup> Res judicata and consolidation limit the freedom to split claims.<sup>133</sup> Nevertheless, substantial freedom remains within these confines.

This policy of litigant control is at its zenith with plaintiffs, who have, at least from the perspective of the Rules, complete freedom under Rule 18(a) to determine the claims they plead.<sup>134</sup> This same notion of litigant control is evident to a more limited extent in the cross-claim provision of Rule 13(g) and impleader provision of Rule 14, in which the claims allowed, although limited, are permissive.<sup>135</sup> Under these rules the party chooses whether or not to raise allowable claims. Commentators often justify the permissive nature of these claims by arguing that parties should be free to decide whether to sue at all,<sup>136</sup> and if they choose to sue, to select the forum.<sup>137</sup> From the litigant's perspective, being able to choose whether to sue, and if suing, being able to select the forum in which to litigate, has several advantages.

Control over whether or not to sue is important because litigation affects the primary conduct of the individuals and entities involved. Whatever their present disagreements, their relationship likely will deteriorate if their conflict escalates to

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131. See *supra* note 8. See generally 7 C. WRIGHT, A. MILLER & M. KANE, *FEDERAL PRACTICE AND PROCEDURE* § 1610 (2d ed. 1986) (discussing personal jurisdiction, subject matter jurisdiction and venue in the context of party joinder).

132. FED. R. CIV. P. 19-20.

133. See *infra* notes 158-61 and accompanying text.

134. See FED. R. CIV. P. 18(a). In contrast, a pleader must bring compulsory counterclaims against an opposing party, and co-parties and parties involved in third-party practice are limited to raising related claims in the first instance. See FED. R. CIV. P. 13(a), 13(g), 14.

135. See *supra* notes 45, 77 and accompanying text.

136. See, e.g., Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1, 35 (1970) (stating that cross-claims should be permissive rather than compulsory to avoid creating an incentive to sue as the only way to preserve a possible claim); cf. 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 13.12[1], at 13-52 (stating that some counterclaims are permissive to preserve for the pleader the option of deciding when the claims should be brought); 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1409, at 48 (same).

137. See 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1431, at 237 (stating that cross-claims are permissive in part because neither party involved has chosen the forum); cf. 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 13.12[1], at 13-51 to -52 (stating that some counterclaims are permissive to protect pleader's right to choose the forum); 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1409, at 48 (same).

litigation.<sup>138</sup> Even if litigation is likely, control over the timing of litigation may have significant strategic advantages.<sup>139</sup>

Forum choice can be extremely important.<sup>140</sup> When more than one forum is available, forum choice may define who can be made parties in the litigation,<sup>141</sup> the nature of the claims that can be heard,<sup>142</sup> and the witnesses who can be compelled

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138. See J. HENRY & J. LIEBERMAN, *THE MANAGER'S GUIDE TO RESOLVING LEGAL DISPUTES* 42 (1985); G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* 85-86 (1983).

139. For example, in areas in which the law is in flux, timing of a suit may be important so that the party may act either before or after a change in the law, whichever is to the party's advantage. See, e.g., A.L.I., *PRELIMINARY STUDY*, *supra* note 128, at 21.

Even when the law is relatively settled, a party may wish to delay raising a claim to see how related claims fare in ongoing litigation. For example, a cross-claimant, for several reasons, may decide not to raise a qualifying cross-claim, choosing instead to wait and see how the related main action develops. This gives the party dual access to the discovery process, both in the suit in which it is a defendant and in the subsequent litigation brought as a plaintiff. Cf. *id.* (stating that parties may delay filing their own actions to take advantage of information discovered in related pending cases). Information the litigant learns in the first proceeding may make discovery more effective in the second. In addition, should the initial case get to trial, the trial provides the party an opportunity to see how certain evidence is received by the judge and jury. This, in turn, may improve the party's trial presentation in the second action. At the least, it will influence the benchmarks for settlement in the second proceeding. Cf. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 371-74 (1986) (stating that common exposure to a case through summary jury trial increases the information available to the parties about the likely outcome of litigation and thus increases the chance for settlement); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution: A Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, 103 F.R.D. 461, 463, 469 (1984) (same).

140. See generally Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 556-60 (1989) (discussing some of the reasons litigants forum shop); Transrud, *supra* note 128, at 820 (discussing the impact of forum choice in tort litigation and the individual litigant's interest in choosing the forum).

141. Subject matter jurisdiction may limit the differing party alignments courts can hear. Cf. 28 U.S.C. § 1332(a) (1982) (stating that federal district courts can hear cases based upon diversity of citizenship only when all of the plaintiffs are of a different citizenship than all of the defendants). Territorial jurisdiction concerns also will limit who can be brought before the court against their will. When such parties cannot be joined and they are not indispensable to the litigation, the litigation will go on in their absence. See, e.g., FED. R. CIV. P. 19(b). Even when subject matter and territorial jurisdiction problems are absent, differences in standards involving the permissive joinder of parties may affect whether particular parties can be joined in the litigation.

142. As with joinder of parties, claim joinder may be limited by subject matter jurisdiction requirements and procedural rules of the forum. See J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 45, § 6.6 at 348.

to attend.<sup>143</sup> Forum choice dictates both the substantive and procedural law the court will apply,<sup>144</sup> as well as the availability of, or requirement that parties employ, various alternative dispute resolution devices.<sup>145</sup> Forum choice also affects the comparative convenience and cost of the litigation.<sup>146</sup> In addition, differences in the judge and jurors who would hear the case in different forums may have a significant impact on the outcome.<sup>147</sup> Finally, should a final judgment be entered in an

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143. A witness can be compelled to attend at trial only if the individual is within the subpoena power of the trial court. FED. R. CIV. P. 45(e); *see, e.g., In re Guthrie*, 733 F.2d 634, 637 (4th Cir. 1984).

144. Choice of law rules dictate the substantive law courts follow, and forums differ both on the choice of law rules to employ and how to implement them. Different court systems also employ different procedural and evidentiary rules. Even within the same court system, local rules may vary the practice from court to court. *See* A.L.I., COMPLEX LITIGATION PROJECT, *supra* note 128, at 19, 27; Juenger, *supra* note 140, at 572-73; Trangsrud, *supra* note 128, at 821.

145. Some court systems require that parties attempt to resolve their differences through some form of alternative dispute resolution, such as mediation or court-annexed arbitration, before they can proceed in litigation. *See, e.g.,* D. PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 44-57 (1986) (describing the differing practices in federal district courts); N. ROGERS & C. MCEWEN, MEDIATION: LAW, POLICY & PRACTICE § 5.1 & app. B (1989) (reporting on the increased use of compulsory mediation in the states); Hensler, *Court-Annexed Arbitration*, in ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS 27 table 1 (1987) (listing court-annexed arbitration programs in federal and state courts); Keilitz, Gallas & Hanson, *State Adoption of Alternative Dispute Resolution: Where Is It Today?*, 12 ST. CT. J., Spring 1988, at 4, 6-8 (reporting that 23 states and the District of Columbia have some form of court-annexed arbitration). Others are likely to encourage, if not require, participation in some form of alternative dispute resolution in the course of the litigation through devices such as summary jury trials. *See generally* W. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES 15-92 (1988) (describing the techniques available); D. PROVINE, *supra*, at 68-80 (same); ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS (1987) (same); Annotation, *Validity and Effect of Local District Court Rules Providing for Use of Alternative Dispute Resolution Procedures as Pretrial Settlement Mechanisms*, 86 A.L.R. FED. 211, 213-15 (1988) (collecting cases).

146. All other things being equal, a plaintiff, as a general rule, will choose the available forum that maximizes the plaintiff's convenience while putting the defendant at the greatest disadvantage. *See* Juenger, *supra* note 140, at 555. Costs and convenience are affected by innumerable factors, such as the physical location of the parties, counsel, witnesses, and other evidence; the need to secure local counsel if a suit is brought in a jurisdiction in which the principal lawyer is not admitted; and the speed with which the court resolves cases. *See* A.L.I., PRELIMINARY STUDY, *supra* note 128, at 19, 27.

147. Whether because of prejudice against a party or a simple difference in life experiences or attitudes, different judges and juries in different locales often respond to cases quite differently. *See generally* M. PETERSON, CIVIL JURIES IN THE 1980S: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND

action, the law of the chosen forum dictates the preclusive effect the judgment will carry should subsequent litigation arise.<sup>148</sup>

The choices of whether to sue and where to sue thus are of unquestioned importance to the litigant. What is unclear is the extent to which the system should honor these preferences at the expense of the efficient resolution of controversies.<sup>149</sup>

## B. RESOLUTION OF ENTIRE CONTROVERSIES

Competing with the policy that a party should have substantial freedom to decide when and how to pursue a claim is the system's interest in the efficient resolution of disputes.<sup>150</sup> If

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COOK COUNTY, ILLINOIS 55 (1987) (finding significant differences in jury verdicts between urban and rural areas); Griffinger & McMahon, *Coordinating Parallel Litigation*, 1988 LITIGATION, Winter, at 38 (describing judge shopping); Juenger, *supra* note 140, at 556, 560 (discussing differences in the size of jury awards in different locales as a reason for forum shopping); Trangsrud, *supra* note 128, at 820-21 (citing studies that juries behave differently in different locales).

148. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 93-95 (1971); G. SHREVE & P. RAVEN-HANSEN, *supra* note 51, §§ 114-16. *But cf.* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4467-69 (1981) (arguing for much broader leeway for a second court to follow its own preclusion doctrine rather than that of the court rendering the judgment).

149. Generally, forum shopping based on the kinds of criteria mentioned in the text is accepted as a natural part of litigation. See, e.g., Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 779 (1984); see also Trangsrud, *supra* note 128, at 820-24 (recognizing the right to individual control as an important consideration counterbalancing efficiency concerns); Rowe & Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 17 (1986) (citing Trangsrud). In recent discussions on the need for greater management of complex litigation, however, several observers have questioned whether traditional notions of individual litigation control deserve much weight. See A.L.I., COMPLEX LITIGATION PROJECT, *supra* note 128, at 25 (stating that "[t]hose who speak of an inescapable tension between the interest of the individual litigants in procedural fairness and the interest of the judicial system in efficient joinder of related claims may well be overstating their case"); Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 813, 833-37 (1989) (challenging the importance of litigant control in structuring the lawsuit); Rosenberg, *supra* note 130, at 581-82 (arguing that forum choice involves "[an] opportunistic manipulation of judicial processes to secure a systematically biased or myopic forum [which] hardly comports with notions of even-handed fairness" and that justice does not require that "the public subsidize [a litigant's] personal preference for separate lawsuits to relitigate common questions"); Williams, *Mass Tort Class Actions, Going, Going, Gone?*, 98 F.R.D. 323, 329 (1983) (terming the "right" of individual plaintiffs to "control their own case" as "totally specious").

150. Counterclaims, cross-claims, impleader, and permissive claim joinder all are premised on the goal of eliminating circuitry of actions and avoiding

the parties resolve all of their claims in one proceeding rather than several, it usually saves time and expense for the court, the parties, and the witnesses involved.<sup>151</sup> Beyond the immediate effect on the participants, consolidation frees up judicial resources for other litigation.<sup>152</sup> Further, resolving interrelated claims in one proceeding increases the opportunity for consistent results.<sup>153</sup> From a broader perspective, consolidation encourages the parties to bring a dispute to a close so they can get on with their lives.<sup>154</sup>

The desire to resolve entire controversies in one proceeding is at the core of the compulsory counterclaim provision in Rule 13(a). That Rule, with limited exceptions, requires parties to raise any claim arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.<sup>155</sup> If a compulsory counterclaim is not raised, it is waived.<sup>156</sup>

As discussed below, one might take this policy further and require all parties of whatever status to raise all claims they have arising out of the same transaction or occurrence.<sup>157</sup> Although the Rules do not explicitly require plaintiffs to do this, the doctrine of *res judicata* in large measure already

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multiple litigation. See 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1403, at 15 (Rule 13 in general), § 1409, at 46 (counterclaims), § 1431, at 229 (cross-claims), § 1442, at 289-90 (impleader), § 1458, at 446 (claims between plaintiffs and third-party defendants); cf. 6A C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1582, at 521 (permissive claim joinder).

151. See A.L.I., COMPLEX LITIGATION PROJECT, *supra* note 128, at 20-24; Freer, *supra* note 149, at 814; Rowe & Sibley, *supra* note 149, at 15-16.

152. See, e.g., Freer, *supra* note 149, at 813; McCoid, *A Single Package for Multiparty Disputes*, 28 STAN. L. REV. 707, 707 (1976); cf. Rosenberg, *supra* note 130, at 564 (stating that increase in time and expense involved in resolving particular controversy adds to time and expense of resolving other cases, given the courts' limited resources).

153. See A.L.I., PRELIMINARY STUDY, *supra* note 128, at 29; A.L.I. COMPLEX LITIGATION PROJECT, *supra* note 128, at 21; Freer, *supra* note 149, at 834; Rowe & Sibley, *supra* note 149, at 15; see also McCoid, *supra* note 152, at 707 (acknowledging this concern, but suggesting it might be "overrated"); cf. 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 14.04, at 14-26 (articulating rationale with respect to impleader).

154. See, e.g., Freer, *supra* note 149, at 814. The joinder rules, like those of *res judicata* and collateral estoppel, seek to encourage a single resolution of related issues. Because of this, the policies underlying them substantially overlap. See G. SHREVE & P. RAVEN-HANSEN, *supra* note 51, § 55[B][1], at 219 n.4. See generally 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 148, § 4403, at 11-22 (articulating the policies underlying the preclusion doctrines).

155. FED. R. CIV. P. 13(a); see *supra* note 14 and accompanying text.

156. See, e.g., *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974).

157. See *infra* notes 220-26 and accompanying text.

does.<sup>158</sup> To avoid waiver of a right to relief, res judicata rules require a party raising a claim to join together "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."<sup>159</sup> Whether res judicata alone is sufficient to achieve the compulsory joinder of plaintiffs' interrelated causes of action is an open question,<sup>160</sup> but at least the res judicata rules reflect a rough parallel in treatment between a claimant and one responding to a claim.<sup>161</sup>

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158. See, e.g., 3A MOORE'S FEDERAL PRACTICE, *supra* note 8, ¶ 18.04[1], at 18-14 (noting that despite the rule of permissive joinder, "where only one cause of action is actually involved the [res judicata] rule against splitting a cause of action will prevent a second cause of action"); 6A C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1582, at 525 (same).

159. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982). Other less expansive definitions of a claim are recognized in federal and state courts, but the trend appears to be toward a transactional approach. See 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.410[1], at 355-59 (2d ed. 1988); 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 148, § 4407, at 55, 59, 62; RESTATEMENT (SECOND) OF JUDGMENTS § 24 comment a (1982); Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209, 1212-13, 1217 (1986).

160. Res judicata may be inadequate in two ways. First, reliance on the often misunderstood doctrine of res judicata as a form of compulsory joinder for plaintiffs may leave the plaintiff with insufficient notice of what must be plead in the initial litigation. This lack of notice creates a problem because the plaintiff may be precluded from raising a claim in subsequent litigation. Cf. MICH. CT. R. 2.203(A)(2) (requiring, in response to this concern, that any objection for a claimant's failure to raise all transactionally related claims against an opposing party in one action must be raised in that action or it is waived and "the judgment shall only merge the claims actually litigated"). See also MICH. GEN. CT. R. 203 committee comment (1963) (describing as the purpose of the predecessor version of the current Michigan provision protection against the inadvertent loss of a claim through claim preclusion); Blume, *The Scope of a Cause of Action - Elimination of the Splitting Trap*, 38 MICH. ST. B.J. 10, 10-13 (Dec. 1959) (lauding the then proposed Michigan provision as eliminating "one of our most vicious procedural traps").

Second, to the extent the res judicata standards to be applied are not as expansive as the transactional definition of a claim — the most expansive definition to date — plaintiffs still have less of a joinder requirement than defendants, an imbalance that is difficult to justify. See 1B J. MOORE, J. LUCAS & T. CURRIER, *supra* note 159, ¶ 0.401[1], at 361; see also Ferriell, *Res Judicata in Ohio: Preclusion of Causes of Action or Claims?*, 10 OHIO N.U.L. REV. 241, 246-47 (1983) (identifying this problem under Ohio law); Friedenthal, *supra* note 136, at 37 (identifying this problem under California law).

161. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 45, § 14.4, at 627 (stating that "[t]he same-transaction test for res judicata is pragmatically equivalent to a compulsory joinder rule . . . imposing a similar compulsion upon the plaintiff [as the compulsory counterclaim rule imposes on defendants, thus] . . . balancing the relative positions of plaintiffs and defendants").

One might ask why sued parties need be compelled to act by rule, rather than simply relying on res judicata to encourage the pleading or waiver of

Although *res judicata* and the compulsory counterclaim rule together trump the policy of litigant freedom of choice, by respectively requiring claimants and those confronting opposing parties to plead related claims in one action, co-party claims related to the litigation and Rule 14 claims are treated differently. The Rules allow, but do not require, parties to raise these claims.<sup>162</sup> In those contexts, freedom of choice outweighs efficiency concerns.

When a litigant files a claim against another, the resulting relationship by definition has deteriorated. *Res judicata* and the compulsory counterclaim rule in essence provide that, if parties are joined in litigation against each other, they should be required to fight the entire battle at one time. Parties are not required to litigate any matter, but they cannot hold back some related claims to fight on a different front. When parties are not yet fighting each other in court, however, different policies come into play. Under these circumstances, the parties are more likely to decide never to sue each other. Thus, a compulsory pleading rule for co-party and impleader claims would force parties to either enter into antagonistic relationships not yet established or waive their nonasserted claims.<sup>163</sup> Further, if parties were compelled to file claims against each other in order to preserve them, it often would undercut a cooperative strategy co-parties might take against a common claimant.<sup>164</sup>

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their claims. *Res judicata*, however, only applies to claims that are pleaded, except in a very limited set of circumstances in which "[t]he relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action." RESTATEMENT (SECOND) OF JUDGMENTS § 22(2)(b) (1982). Thus, absent the compulsion of the counterclaim rule, a defendant would not be required to raise a related claim. Nevertheless, the first litigation may resolve issues central to the defendant's claim and thus as a practical matter preclude its assertion in subsequent litigation through the doctrine of collateral estoppel. *See, e.g.,* N.Y. CIV. PRAC. L. & R. § 3019(a) practice commentary C3019:2. *See also* 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 13.12[1], at 13-51 (acknowledging but rejecting the argument that the compulsory counterclaim is unnecessary because of the operation of *res judicata* and collateral estoppel).

162. *See* FED. R. CIV. P. 13(g), 14. Of course, if a party decides to bring a cross-claim or Rule 14 impleader claim, the doctrine of *res judicata* requires the party to bring the entire claim at one time or risk preclusion. *See supra* notes 158-60 and accompanying text.

163. *See* Friedenthal, *supra* note 136, at 35.

164. *See id.* But *see* *Wm. Blanchard Co. v. Beach Concrete Co.*, 150 N.J. Super. 277, 292-97, 375 A.2d 675, 680-84 (App. Div.) (requiring pleading of related claims by co-parties under New Jersey's "entire controversy doctrine," and rejecting the argument that co-parties should be allowed to withhold

For all these reasons, the Rules allow pleading of related claims in cross-claims and third-party practice, to achieve the efficiency of litigating a whole controversy in one action. The Rules do not make such pleading compulsory, however, in order to avoid creating an incentive for litigation that otherwise might never arise.<sup>165</sup>

### C. THE PROPRIETARY VIEW OF LITIGATION

Subject to the pressure of the competing concerns related above, one may take a proprietary view of litigation. A plaintiff initiates a lawsuit to vindicate certain rights protected by law. To the extent other parties raise claims within the litigation, the lawsuit becomes more cumbersome and the plaintiff's opportunity to use the system effectively for vindication of its claims decreases. The Rules thus are structured to reduce the instances in which the plaintiff will become a bystander while collateral claims of others are litigated.

As mentioned above, the Rules give a plaintiff a great deal of freedom in initially structuring the litigation.<sup>166</sup> To allow the plaintiff unilateral control of the litigation, however, might unfairly disadvantage other parties or the system as a whole. Thus, the Rules allow a modification of the plaintiff's choices when unfairness would occur. In the context of multi-claim litigation, when a plaintiff sues a defendant, the plaintiff loses the right to limit its opponent's claims.<sup>167</sup> It would be unfair to allow the plaintiff to choose the claims pursued and then limit the defendant's response. When the plaintiff picks a fight, the defendant is free to fight back.

Cross-claims between co-defendants and claims between defendants and third-parties, however, do not involve the plaintiff directly. Litigating these claims can complicate and delay the plaintiff's suit.<sup>168</sup> Out of concern for fairness to the par-

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claims in order "to present a 'united front' " against adverse claimants), *certif. denied*, 75 N.J. 528, 384 A.2d 507 (1977).

165. *But cf.* Freer, *supra* note 149, at 823 n.76 (stating that "there appears to be no reason for not making cross-claims compulsory").

166. *See supra* note 130 and accompanying text.

167. *See* FED. R. CIV. P. 13(a), (b).

168. Even when qualifying cross-claims are involved, the presence of such claims may force the plaintiff's action to take a back seat. *See, e.g.,* Friedenthal, *Whom to Sue - Multiple Defendants*, in 5 AM. JURIS. TRIALS § 8, at 13 (1966) (warning plaintiffs that in filing suits against multiple defendants, they should be aware that the defendants might cross-claim and make those

ties,<sup>169</sup> and overall efficiency,<sup>170</sup> however, the Rules allow pleading of related claims not involving the plaintiff.<sup>171</sup> Fostering fairness and allowing resolution of whole controversies simply outweighs the concern that the plaintiff's chance for recovery is made more difficult. Further, if the plaintiff is severely harmed by the inclusion of these other claims in the litigation, the court may order severance or a separate trial.<sup>172</sup> Claims unrelated to the litigation, however, cannot be raised through cross-claims or impleader until a qualifying claim is pleaded.<sup>173</sup> The additional efficiency of raising unrelated claims in the already filed action,<sup>174</sup> is simply insufficient to outweigh the concern for the plaintiff's proprietary interest in its own

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claims the "focus of the lawsuit," diminishing the importance of the plaintiff's claim, and resulting in a less favorable verdict for the plaintiff).

Aside from delay and confusion, litigation of these claims may even prejudice the plaintiff's case on the merits. For example, in a suit by an injured party against an employer for injuries caused by an employee, the employer often will seek to implead the employee. It does so to alert the jury that the employee ultimately may be responsible for any judgment, in the hope that this will arouse jury sympathy and lead to a smaller damage award than had the employer been in the suit alone. Because of this potential for prejudice, impleader claims such as these often are severed. See 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1443, at 307-08. In fact, in some systems the plaintiff retains an absolute right, upon request, to have the claims adjudicated in separate trials. See, e.g., OH. R. CIV. P. 14(A) (stating that "[i]f the third-party defendant is an employee, agent, or servant of the third-party plaintiff, the court shall order a separate trial upon the motion of any plaintiff").

169. Cf. 3 MOORE'S FEDERAL PRACTICE, *supra* note 12, ¶ 14.04, at 14-26 (citing the serious handicap a defendant would face if forced to pursue its claim for liability over only after judgment was entered against it); 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1442, at 290-91 (same).

170. See *supra* notes 150-54 and accompanying text.

171. The relationship required between the main action and a cross-claim or an impleader claim differ. See *supra* note 37 and text accompanying *supra* note 95. Impleader claims are more limited, perhaps because bringing a new party into the proceeding is more burdensome than adding claims among those already parties, and thus is more disruptive of the plaintiff's interest in resolving her own claims. But cf. FED. R. CIV. P. 13(h) (allowing a party to bring in an outside party as a co-defendant to a cross-claim).

172. See FED. R. CIV. P. 13(i) (providing for separate trials for cross-claims); FED. R. CIV. P. 14(a) (allowing severance or separate trial for third-party claims); cf. FED. R. CIV. P. 42(b) (providing for separate trial "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy").

173. FED. R. CIV. P. 13(g), 14. See *supra* notes 112-14 and accompanying text.

174. Even the joinder of unrelated actions may allow cost savings in filing fees, service of process, and coordinated discovery. See, e.g., Friedenthal, *supra* note 136, at 6.

suit.<sup>175</sup>

Falling in between these situations are claims between the plaintiff and the third-party defendant. Unlike claims between the plaintiff and the original defendant, these claims are not an outgrowth of the litigation unit the plaintiff originally chose. On the other hand, these claims at least involve the plaintiff directly, while cross-claims and impleader claims do not.<sup>176</sup> In deference to the plaintiff's right to structure the lawsuit initially and thereby limit the scope of the retaliatory effort it is likely to face, the Rules limit the third-party defendant's claims against the plaintiff to those arising out of the transaction or occurrence that is the subject matter of the claim between the plaintiff and the original defendant.<sup>177</sup> The Rules place the same restriction on the plaintiff's claims against the third-party defendant,<sup>178</sup> but for a different reason. Had the plaintiff sought to sue the original defendant and the third-party defendant in the initial action as co-defendants, the plaintiff would have been required under Rule 20 to assert against each of them at least one claim that arose out of the same transaction or occurrence and shared a common question of law or fact.<sup>179</sup> The limitation in Rule 14 approximates that restriction and ensures that the plaintiff cannot do indirectly what would be prohibited directly by Rule 20.<sup>180</sup> The Rules thus incorpo-

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175. See, e.g., *McCormick v. Mays*, 124 F.R.D. 164, 167-68 (S.D. Ohio 1988); see also 6 C. WRIGHT, A. MILLER & M. KANE, *supra* note 8, § 1431, at 237 (stating that cross-claims are limited to related claims to protect the plaintiff from becoming a mere bystander to the litigation). Although some efficiency savings are possible from the common litigation of related and unrelated claims, they are likely to be small, and may be outweighed by the additional complexity that litigation of unrelated claims would bring to the proceeding. Cf. *id.* (discussing concern for complexity).

176. Going back to the hypothetical set forth in the beginning of the Article, *A*, who contracted for the building of an office building, chose to file suit only against the general contractor [*B*] and a particular subcontractor [*C*]. Assume *C* in turn brought in *D*, a supplier, for indemnification or contribution. At this point *A* may now assert a claim against *D* so long as the claim is transactionally related to the initial claims *A* brought against *C*, the party that impleaded *D*. For example, *A* might now assert a claim against *D* for breach of a supply contract that in turn contributed to the breaches by *C*, the subcontractor, being sued upon in *A*'s initial complaint. See generally Brailsford, *supra* note 31, § 5.1-.20 (describing claims available to owners against material suppliers).

177. FED. R. CIV. P. 14(a).

178. *Id.*

179. See FED. R. CIV. P. 20(a).

180. Professors Wright, Miller, and Kane attribute this restriction to the "policy of preventing the litigation from expanding to include unrelated claims that might unduly complicate the action." 6 C. WRIGHT, A. MILLER & M.

rate the policy of protecting the plaintiff's proprietary interest in the litigation by requiring claims either to be brought by the original plaintiff or defendant or to be transactionally related thereto.

#### D. EQUAL OWNERSHIP OF THE FORUM

The limits of the proprietary view become apparent upon consideration of the effect of Rule 18(a). As discussed earlier, cross-claims and impleader claims initially are limited to claims that arise out of the original litigation.<sup>181</sup> This follows from the belief that the plaintiff has some right to structure the suit and assure that his or her controversy, and claims related to it, become the center of the litigation.<sup>182</sup> The Rules give defendants broader latitude to raise claims against the plaintiff, but only because it seems unfair to restrict the defendant's actions in head-to-head combat with the plaintiff.<sup>183</sup> Yet, this basic restriction on claims not directly involving the plaintiff falls by the wayside once the defendant asserts a qualifying claim. Rule 18(a) then allows the cross-claimant or the third-party plaintiff to assert any claim.<sup>184</sup>

At first blush, none of the justifications courts and commentators have asserted for this practice seem strong. Rule 18(a)'s broad provision for the joinder of claims usually is supported by the notion that "no inconvenience can result from joinder of any two or more matters in the pleadings, but only from trying two or more matters together which have little or nothing in common."<sup>185</sup> In other words, if any unfairness arises simply try the claims separately. Although this is a principled philosophy, it supports unlimited claim joinder, not the requirement that a party seeking to assert a cross-claim or third-party claim first must plead a qualifying claim before non-qualifying claims can follow.<sup>186</sup>

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KANE, *supra* note 8, § 1459, at 449. I suspect this policy is behind the restrictions on permissive party joinder in Rule 20 as well.

181. See *supra* notes 112-14 and accompanying text.

182. See generally *supra* Part III. D. (discussing proprietary interest of plaintiff as a policy supporting limitation of certain claims not central to the litigation).

183. See *supra* text accompanying note 167.

184. FED. R. CIV. P. 18(a); see *supra* note 112-14 and accompanying text.

185. FED. R. CIV. P. 18 advisory committee's note (1966) (quoting Sunderland, *The New Federal Rules*, 45 W. VA. L. REV. 5, 13 (1938)).

186. Indeed, Professor Kaplan, advisory committee reporter for the 1966 amendments to Rule 18, admits as much, but supports the more limited incremental increase in claim joinder accomplished through the 1966 amendment to

A second rationale might be one of litigant equality. Litigants should be treated equally, so co-defendants and third-party plaintiffs should be as free as plaintiffs to assert claims. Again, this is a justifiable position, but it militates in favor of unqualified joinder of claims, not unqualified joinder only after passing a threshold test.

Perhaps Rule 18(a) is really a rough accommodation of competing interests. Until the co-defendant or third-party plaintiff asserts a qualifying claim, protection of the plaintiff's proprietary interest in the litigation deserves deference. Once such a claim has been raised, however, the claimant voluntarily has accepted the forum as her own and in so doing has as much right to use the forum to its fullest as does the plaintiff. At that point, equality of treatment trumps the plaintiff's proprietary interest.

Further, to do otherwise would create a system of perverse incentives. A co-defendant or a third-party plaintiff would be faced with the choice either of litigating the related claim in the first action and the unrelated claim in a separate action, or waiting to raise both claims in a separate proceeding in which both claims could be joined. Given that a second suit would be required if joinder were not allowed in the first action, the attractiveness of asserting the related claims in a second suit might undercut the efficiency the cross-claim and impleader rules otherwise are trying to foster.<sup>187</sup>

#### E. SOME FURTHER ILLUSTRATIONS OF HOW THE POLICY COMPROMISES WORK

Yet to be addressed are the way the Rules provide for shifting status once a party is sued, and the treatment the Rules accord claims between co-defendants of the third-party plaintiff and the third-party defendant. The unique interaction of the policies already discussed in these contexts deserves mention.

##### 1. Shifting Status

At first blush the treatment of the sued co-defendant

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Rule 18(a) by noting: "[R]ulemakers must not march too far ahead of the parade." Kaplan, *supra* note 126, at 597-99. Dean Charles Clark, a member of the initial advisory committee for the Federal Rules, has commented that complete freedom of joinder is consistent with the philosophy underlying the joinder rules. See Cleveland Institute, *supra* note 56, at 261-62.

187. See Friedenthal, *supra* note 136, at 33-34.

under the Rules seems strange. Why set up special rules for co-defendants limiting the claims they can bring and making their pleading discretionary rather than mandatory, only to have those limitations cease and their status shift to that of opposing parties once one defendant files suit against the other? A similar question exists with regard to Rule 14 claims.

To the extent the Rules seek to protect the plaintiff from becoming a bystander in her own litigation, the shift makes no sense. Subjecting the sued co-party to the compulsory counterclaim rule and allowing that co-party to sue on unrelated claims without first asserting a qualifying claim can only foster litigation in which the plaintiff is not directly involved. Nevertheless, the efficiency and fairness concerns that mandate counterclaim treatment for the claims of the defendant against the original plaintiff apply to the claims of the sued co-party as well.<sup>188</sup> Apparently the drafters of the Rules felt these efficiency and fairness concerns are of sufficient moment to outweigh the potential harm to the plaintiff's interests and the loss of freedom of choice encountered by the sued co-party.

## 2. Claims Between Co-Defendants of the Third-Party Plaintiff and the Third-Party Defendant

As previously mentioned, the Rules make no specific provision for claims between the co-defendant of the third-party plaintiff and the third-party defendant.<sup>189</sup> Nevertheless, most courts try to find a procedural vehicle to hear such claims, usually treating them under the cross-claim, impleader, or Rule 13(h) provisions.<sup>190</sup>

Under any of these theories, the claims allowed are permissive, thus preserving litigant control over the assertion of claims. Allowing pleading of claims between these parties furthers the policy goal of resolving entire controversies in a single proceeding. Moreover, not allowing any claims between the co-defendant of the third-party plaintiff and the third-party defendant would create procedural inequality between the original co-defendants. Assuming each had an impleader claim against the same third party, the party that first asserted its claim would divest the other of the opportunity to raise its im-

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188. It is primarily the efficiency concern that underlies compulsory counterclaim requirements, and the fairness concern that militates in favor of permissive counterclaim rules.

189. See *supra* note 87 and accompanying text.

190. See *supra* notes 88-103 and accompanying text.

pleader claim in the proceeding.<sup>191</sup> Not only would this prejudice the slower party for no apparent reason, it also would create an unwarranted incentive for a party to bring impleader claims, and to do so quickly, to preserve its claims and perhaps disadvantage another litigant.<sup>192</sup>

Among the different approaches courts take to allow parties to assert claims in this setting, the impleader approach seems best for two reasons. First, impleader provides equality of treatment among the original co-defendants. Regardless of who acts first, each retains the right to seek liability over from the third-party defendant, and no more, as a qualifying claim. Second, impleader generates less collateral litigation than cross-claim treatment because impleader claims are limited to claims for liability over as a threshold requirement, while cross-claim rules require only that claims have a transactional relationship to the main litigation.<sup>193</sup>

#### F. SUMMARY

Given the policy that litigants should have the freedom to structure their own litigation, plaintiffs are given substantial freedom in determining the claims to bring in one action. Because of the systemic need to resolve entire controversies among adversaries, defendants are required to raise their transactionally related claims as compulsory counterclaims. Notions of fairness, equality of treatment, and efficiency also allow defendants to raise unrelated claims as permissive counterclaims. As to matters collateral to the plaintiff's original claims, deference to the plaintiff's proprietary stake in the litigation initially limits the claims that can be brought. Efficiency and fairness notions, however, command that other parties in the litigation be allowed, although not required, to raise collateral claims on matters sufficiently related to the litigation.

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191. See *supra* notes 90-91 and accompanying text.

192. See *Georgia Ports Auth. v. Construzioni Meccaniche Industriali Genovesi, S.P.A.*, 119 F.R.D. 693, 695 (S.D. Ga. 1988); *supra* note 98. For example, in the hypothetical posed in the beginning of the article, *A*, the builder of an office building, sues *B*, the general contractor, and *C*, a subcontractor for breach of contract. Either *B* or *C* may have a contractual right of indemnification or a right of contribution against *D*, a supplier that failed to meet its supply obligations contributing to the problems arising in the completion of the building. See generally *Bowers, supra* note 29, § 5.3, at 35-36 (discussing impleading of suppliers by contractors). Allowing the party that acts first to cut off the right of the other to assert its rights to indemnification or contribution seems unwarranted.

193. See *supra* text accompanying notes 19-20, 27 & 37.

Once collateral disputants have embraced the forum by raising a discretionary claim and have entered into an adversarial relationship, they are allowed and required to use the proceeding as fully as if they had initiated it.

#### IV. POSSIBLE REFORMS

As presently written, the Federal Rules covering multi-claim litigation at best lack clarity and at worst may materially mislead litigants about their rights and responsibilities. At a minimum, the Rules should be amended to clarify these ambiguities.

More broadly, the Rules reflect an accommodation of conflicting policies that may not be optimal. Although the federal model is the predominant one in the states,<sup>194</sup> it by no means constitutes the exclusive approach. A review of alternative approaches provides a framework for a more critical assessment of the federal scheme.

##### A. LANGUAGE REFORM — PERFECTING THE STATUS QUO

Assuming agreement with the policy compromises implicit in the current Rules, amendment to the Rules still is desirable to clarify existing ambiguities. From this perspective, the major problem with the Rules today is that they are likely to mislead litigants about their rights and duties in multiple claim litigation.<sup>195</sup>

The Rules at present suffer from four major deficiencies.<sup>196</sup>

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194. See *supra* note 1.

195. This part of the Article suggests changes in the language of the multi-claim rules that will make them more clear and direct. Another problem that arises in this area, however, is the unarticulated influence of *res judicata* and collateral estoppel on the pleading process. Regardless of the requirements of the procedural rules, the preclusion doctrines may, as a practical matter, bar parties from litigating a claim not asserted in the first action. See *supra* text accompanying notes 158-61. Reforming the multi-claim rules to provide explicit notice of their interaction with the preclusion doctrines is discussed *infra* text accompanying note 219; *supra* text accompanying note 160.

196. In addition to the problems discussed in the text, the multi-claim rules suffer from some less significant ambiguities as well. For example, Rule 18 authorizes joinder of claims with respect to "an original claim, counterclaim, cross-claim, or third-party claim," but does not explicitly mention claims between the original plaintiff and the third-party defendant. FED. R. CIV. P. 18(a). Perhaps such claims are "third-party claims" because they are authorized under the "Third Party Practice" rule (Rule 14), but it is not completely clear. See FED. R. CIV. P. 14(a).

Further, Rule 18(a) provides that "[a] party asserting a claim to relief as . . . [a] cross-claim . . . may join . . . as many claims . . . as the party has against

First, many litigants are likely to be unaware, without the court informing them,<sup>197</sup> that even if they initially are outside the purview of the counterclaim rules, their status shifts and they become subject to those rules after a claim has been asserted against them.<sup>198</sup> Second, the Rules inadvertently limit the scope of impleader practice.<sup>199</sup> Third, the Rules make no provision for claims between co-defendants of the third-party plaintiff and the third-party defendant.<sup>200</sup> Finally, co-parties and third-party claimants may not know that although Rules 13(g) and 14 limit the claims they may raise, Rule 18(a) allows them to bring nonqualifying claims once a qualifying claim is asserted.<sup>201</sup> These problems could be solved in a number of ways.

### 1. The Problem of Shifting Status

Several approaches to the problem of shifting status are available. One approach is to include a definition of the phrase "opposing party" within the Rules. Such a provision might read:

Opposing party — Any party asserting a claim, whether an original claim, counterclaim, cross-claim or third-party claim, becomes an opposing party to the party sued. In making a response, the party sued is subject to the counterclaim provisions of Rule 13.<sup>202</sup>

Because the Federal Rules do not include a definitional section, this approach, while simple and direct, may be too different in form for adoption.<sup>203</sup>

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an opposing party." FED. R. CIV. P. 18(a). Given that the law distinguishes between co-parties, who are to bring cross-claims, and opposing parties, against whom counterclaims are brought, the language appears confusing. Montana attempts to correct this by adding the words "or coparty" to the end of the Rule. MONT. R. CIV. P. 18(a) advisory committee's note (1967).

197. Cf. *Mohr v. State Bank*, 241 Kan. 42, 51, 734 P.2d 1071, 1079 (1987) (informing the claimant that its claim was a compulsory counterclaim in a pending action, and advising the claimant to amend its answer in the first litigation and to assert the claim in that proceeding).

198. See *supra* notes 51-52 and accompanying text.

199. See *supra* notes 84-85 and accompanying text.

200. See *supra* note 87 and accompanying text.

201. See *supra* notes 112-14 and accompanying text.

202. As presently written, the counterclaim rules speak of the counterclaimant as "the pleader" and the person against whom the counterclaim is asserted as an "opposing party." FED. R. CIV. P. 13(a), (b). The definition suggested in this Article follows this approach. Alternatively, one might define a party sued as an "opposing party" to the original claimant and then rewrite the counterclaim rules to govern the pleading of counterclaims by opposing parties against ones who have asserted a claim against them.

203. This somewhat overstates the case. In setting forth the circumstances in which particular rules operate, the drafters at times do define terms indi-

An alternative approach is to alter the language of Rules 13(g) and 14. Three alternative suggestions for changes in Rule 13(g) are provided below. Analogous changes could be made to Rule 14 as well.<sup>204</sup>

One approach is to add the following sentence at the end of current rule 13(g):

Once a cross-claim has been pleaded against a co-party, the cross-claimant becomes an opposing party and the responding party is subject to the counterclaim provisions of Rule 13.

As another formulation, one might add:

The party against whom a cross-claim is asserted must plead as a counterclaim any right to relief that party has against the cross-claimant that arises from the same transaction or occurrence.<sup>205</sup>

Alternatively, the language of Rule 14 concerning third-party defendants could be imported into Rule 13. Under this approach the following sentence would be added to the end of current Rule 13(g):

The co-party served with the cross-claim shall make any defenses to the cross-claim as provided in Rule 12 and any counterclaims against the cross-claimant and cross-claims against any other co-parties as provided in Rule 13.

Any of these alternatives has several advantages over the definitional proposal noted above. Each is in keeping with the present format of the Rules. In addition, each would be located directly in the provision dealing with cross-claims and co-parties. It thus is more likely that a co-party subject to a cross-claim will find this rule and be alerted to the shift in status.

Among the proposed alternatives, the latter has the advantage of using language familiar to practitioners and courts. On the other hand, it strikes me as overkill, as it does in its present

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rectly. Cf. FED. R. CIV. P. 19(a) (defining persons to be joined if feasible through the criteria set forth).

204. In discussing claims that can be raised by the third-party defendant, Rule 14 specifies that the third-party defendant shall assert counterclaims in response to claims by either the original plaintiff or the third-party plaintiff as provided in Rule 13. FED. R. CIV. P. 14(a). The Rule, however, does not discuss what provisions govern an original plaintiff's or third-party plaintiff's claim made in response to a claim raised by the third-party defendant. The specific reference to Rule 13 counterclaims when the third-party defendant is sued, and the silence when claims are raised against the original plaintiff or the third-party plaintiff, creates unnecessary ambiguity. See *Developments*, *supra* note 79, at 975.

205. Cf. ALA. R. CIV. P. 13 committee comments (setting forth this provision in essentially the same language). Although Alabama put this language in the committee comments accompanying Rule 13, it is better placed in the text of the rule itself because a lawyer may not check the advisory committee notes, assuming the text to be clear.

Rule 14 usage as well. The first two suggestions seem simpler, more direct, and better address the area in which confusion most likely arises.

## 2. Claims Between Co-defendants of the Third-Party Plaintiff and the Third-Party Defendant, and the Proper Scope of Impleader

Given that courts take different procedural approaches to claims between co-defendants of the third-party plaintiff and the third-party defendant,<sup>206</sup> the necessary revision will depend on the court's approach.<sup>207</sup> Under the approach suggested here, which is to treat the relationship as one of impleader, Rule 14 might be amended to state in part:

[A] defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the *original* action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

Adding the italicized term captures the reading advocated by the courts adopting the impleader approach.<sup>208</sup> It suffers, however, in two respects. First, it speaks of service of a summons, which is necessary for a non-party, but unnecessary for a party already in the proceeding. Although it is possible to write the Rule to eliminate that misstatement, it would make the Rule awkward. Second, and more importantly, even with this amendment the Rule still fails to reach what I suspect is its intended goal — to freely allow impleader for anyone in the litigation who is subject to a claim.

As mentioned earlier, the present Rules do not allow pleaders to raise contingent claims against opposing parties,<sup>209</sup> nor do they explicitly provide for such claims by a party subject to a cross-claim.<sup>210</sup> To reach this latter goal, Rule 13(g) could be amended to eliminate its provision for liability over, leaving

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206. See *supra* text accompanying notes 88-108.

207. For example, although I do not advocate this approach, some authorities treat the co-defendant of the third-party plaintiff and the third-party defendant relationship as that of co-parties. See *supra* notes 88-89 and accompanying text. To reflect this under the Rules, future drafters might add a definitional section that defines co-parties to include this relationship. Alternatively, Rule 14 could spell out expressly the permissible claims between these parties, much as it does for the claims between the original plaintiff and the third-party defendant.

208. See, e.g., *Malaspina v. Farah Mfg. Co.*, 21 Fed. R. Serv. 2d (Callaghan) 129, 130 (S.D.N.Y. 1975).

209. See *supra* note 25.

210. See *supra* note 84 and accompanying text.

Rule 14 as the sole source of this authority. Rule 14 then would be rewritten to read:

[A] defending party, as a third-party plaintiff, may assert a claim against a party, or cause a summons and complaint to be served upon a person not a party to the action, alleging that the party is or may be liable to the third-party plaintiff for all or part of a claim asserted in the action against the third-party plaintiff.

This revision would eliminate all barriers to impleader practice and allow use of Rule 14 by any party against whom a claim for relief has been asserted. It would eliminate the problem caused by the Rule's current interpretation, proscribing an opposing party from raising a contingent claim. It would provide express authorization for impleader for a party subject to a cross-claim.<sup>211</sup> Finally, it would provide a vehicle for co-defendants of the third-party plaintiff to assert impleader claims against the third-party defendant.<sup>212</sup> This latter approach best reflects the Rule's intent.

### 3. Joinder of Non-Qualifying Claims to Qualifying Ones

Two basic approaches, or a combination of them, would alert co-parties and third-parties that once they raise a qualifying claim, they then are free to join non-qualifying claims. One approach is to add a sentence to Rule 18(a) to that effect. For example:

Additional claims may be joined to a proper cross-claim or third-party claim, even if the additional claims would not qualify as proper cross-claims or third-party claims if sued upon alone.

Alternatively, revisors could add similar language to the cross-claim or third-party practice rules. For example, one might add the following to Rule 13(g):

Additional claims may be joined to a proper cross-claim even if the

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211. Under Rule 14, impleader is authorized expressly for defendants in response to plaintiffs' claims, plaintiffs in response to defendants' claims, and third-party defendants in response to third-party plaintiffs' claims. In each of these situations the claim involves the plaintiff in some manner. Either the plaintiff itself is seeking impleader, or other parties are seeking to pass along liability flowing from the plaintiff's initial claim. Allowing a co-party to use impleader in response to a cross-claim, in contrast, does not involve the plaintiff or the plaintiff's claim at all. If our only goal were to protect the plaintiff's proprietary interest in the lawsuit, these claims would not be allowed. I believe, however, that the same fairness and efficiency concerns that allow impleader in the first place still should win out here, even though these impleader claims are somewhat further from the plaintiff's interests.

212. As a stylistic matter, this revision also would eliminate the need for separate provisions authorizing impleader by the third-party defendant and the plaintiff. See FED. R. CIV. P. 14(a), (b).

additional claims would not qualify as proper cross-claims if sued upon alone.<sup>213</sup>

As a hybrid, revisors could amend Rule 18(a) as indicated above and then add a cross-reference to Rule 18 in both the cross-claim and third-party practice rules. The addition to Rule 13(g) might read:

The cross-claimant may raise multiple claims in accordance with the provisions of Rule 18(a).

The first option, amending Rule 18(a), has the advantage of maintaining Rule 18(a) as central authority for multiple claim assertion by a party. In whatever context the question of whether a party can join claims together arises, Rule 18 would provide an answer. The problem with this approach is that a co-party may look to Rule 13(g), see the limitation on allowable claims, and never think that another rule might trump the apparent limitation. Therefore, treating the matter in the cross-claim rule itself is more likely to alert the party. The hybrid solution seeks to meet both concerns. The cross-reference alerts the litigant that Rule 18 also should be consulted, while Rule 18(a) retains its role as the single source of authority for multi-claim litigation.

## B. STRUCTURAL REFORM — CHANGING THE POLICY MIX

Beyond amending the language of the Federal Rules to avoid present ambiguities, it may be appropriate to re-think the fundamental policy compromises inherent in the current structure. Out of such a re-assessment, a consensus may emerge for amendment of the multi-party rules to reflect a different policy mix. One place to begin this re-assessment is by looking at the procedural approaches taken in the states.

Despite the dominance of the Federal Rules model for multi-claim litigation,<sup>214</sup> significant variations exist among the states. These alternatives can be grouped into four major categories, each reflecting a different emphasis among the previously identified policies at work in the multi-claim context.

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213. Cf. FLA. R. CIV. P. 1.180(a) (providing that in addition to a claim for impleader, the original defendant "may also assert any other claim that arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim"); N.J. CIV. PRAC. R. 4:8-1 (providing a third-party practice rule with similar language).

214. See *supra* note 1.

## 1. Maximizing Litigant Control

The procedural rules in some states place a premium on providing litigants freedom to determine whether or not to bring a claim. These states eschew compulsory rules of any kind.<sup>215</sup>

Because in many instances the parties themselves will want the efficiency that comes with the single litigation of a related controversy, they often will assert claims voluntarily that would be compulsory in other states or in the federal system.<sup>216</sup> In addition, pressure to bring related claims arises independently of state rules of civil procedure, from the doctrines of res judicata and collateral estoppel.<sup>217</sup>

States with completely permissive claim rules depend on preclusion to encourage efficient joinder of claims. This approach seems flawed. To the extent the preclusion doctrines really compel joinder of related claims as a practical matter,<sup>218</sup>

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215. The one compulsory claim under the Federal Rules is the compulsory counterclaim; the rest are permissive. See FED. R. CIV. P. 13(a). In a number of states, however, even a transactionally related counterclaim is permissive. See CONN. R. CT. § 116; ILL. CODE CIV. P. § 2-608; LA. CODE CIV. P. ANN. art. 1037; MD. R. CIV. P. 2-331(a); MICH. R. CT. 2.203(C); NEB. REV. STAT. §§ 25-812, 25-814 (1985); N.Y. CIV. PRAC. L. & R. § 3019(a); OR. R. CIV. P. ANN. 22 A.(1); R. VA. SUP. CT., 2:13, 3:8; WIS. CT. R. AND PROC. § 802.07(1).

216. Cf. Clausen & Lowe, *The New Wisconsin Rules of Civil Procedure: Chapters 801 to 803*, 59 MARQ. L. REV. 1, 58-59 (1976) (stating that the committee considering amendments to the Wisconsin procedural rules decided not to adopt a compulsory counterclaim provision in part because "the absence of a compulsory counterclaim rule [had] not caused any significant problem in Wisconsin practice").

217. Res judicata requires a claimant to bring an entire "claim" at one time, in whatever manner the unit "claim" is defined by the law of the particular state. See *supra* note 159. The doctrine of collateral estoppel precludes litigants, whether or not claimants themselves, from relitigating issues actually litigated, determined, and essential to the first action. See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). Cf. Clausen & Lowe, *supra* note 216, at 58-59 (explaining that Wisconsin decided not to adopt a compulsory counterclaim rule in part because "the purpose of compulsory counterclaims . . . is promoted in Wisconsin law by the rules of collateral estoppel"). See also N.Y. CIV. PRAC. L. & R. § 3019(a) practice commentary C3019:2 (noting that under New York Civil Practice all counterclaims are permissive, but highlighting the potential impact of collateral estoppel "which can have the same impact as a compulsory counterclaim rule").

218. It is not clear whether the preclusion doctrines are a sufficient substitute for compulsory joinder provisions in promoting the resolution of entire controversies in one proceeding. The effectiveness of claim preclusion as a compulsory joinder device turns both on how broadly the jurisdiction defines a claim and on the extent claim preclusion can affect those who are in the litigation but choose to assert no claims. See *supra* notes 158-61 and accompanying text. Given the vagaries of issue preclusion doctrine, the likelihood that a par-

this approach enhances litigant freedom only incrementally. Further, it does so at a heavy price. Relying on the preclusion doctrines increases the potential that litigants will be misled by the permissive language of the joinder rules and thus will lose claims inadvertently through preclusion.<sup>219</sup>

## 2. Ensuring Single Litigation of Entire Controversies

At the other end of the spectrum, a number of states go further than the Federal Rules in requiring litigants to raise related claims. They insist on some or all of the following: claimants must join all claims they have against an existing opponent that arise out of the transaction or occurrence that is the subject matter of the action;<sup>220</sup> plaintiffs must raise all related claims they have against any third-party defendant brought into the litigation;<sup>221</sup> certain impleader claims are compul-

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ticular issue will be precluded in subsequent litigation is simply too uncertain to substitute for a compulsory joinder rule. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS §§ 28-29 (1982) (discussing exceptions to issue preclusion).

219. This problem might be cured in part by alerting parties, in the text of the Rules themselves, that preclusion doctrine is independent of the permissive joinder rules, and thus the preclusion doctrine may affect a party who fails to raise a related claim irrespective of the Rules. *See, e.g.*, MISS. R. CIV. P. 13(a) (providing that "[i]n the event an otherwise compulsory counterclaim is not asserted in reliance upon any exception stated in paragraph (a), relitigation of the claim nevertheless may be barred by the doctrines of res judicata or collateral estoppel by judgment in the event certain issues are determined adversely to the party electing not to assert the claim").

220. MICH. CT. R. 2.203(A)(1) (requiring a pleader stating a claim against an opposing party to raise every transactionally related claim it has against that party). The Rule does not require pleading of a claim, but merely requires that if a claim is brought, all transactionally related claims against the opponent must be included. 1 J. HONIGMAN & C. HAWKINS, MICHIGAN COURT RULES ANNOTATED 479 (1962). It applies not only to the original claims of the plaintiff against the defendant, but to any claims raised in the litigation. *Id.* at 476 (discussing application to counterclaims, cross-claims and third-party claims).

In effect, the compulsory joinder application of this rule simply mirrors the effect of res judicata in a state that defines a claim in transactional terms. *See supra* note 159. In fact, the Rule was thought to codify Michigan res judicata practice in this regard. *See* MICH. GEN. CT. R. 203.1 committee notes (1963). Its novelty is its presence as a pleading rule, rather than as a common law requirement. The Michigan Rule also requires that an objection for failure to join a compulsory claim must be raised in the initial litigation or it is waived, limiting the effect of the preclusion doctrines to the actual claim litigated and the collateral estoppel consequences of the first action. MICH. CT. R. 2.203(A)(2); *supra* note 160.

221. *See, e.g.*, ALA. R. CIV. P. 14(a) & committee comments (providing that plaintiff's failure to raise a related claim against a third-party defendant bars the plaintiff from raising the claim in another action); MAINE R. CIV. P. 14(a)

sory;<sup>222</sup> cross-claims are compulsory;<sup>223</sup> and finally, all litigants must raise any claims they have related to the action.<sup>224</sup>

As more related claims are made compulsory, the efficiency occasioned by litigating related claims at one time increases.<sup>225</sup> In addition, the presence of an entire controversy

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(same); MD. R. CIV. P. 2-332(c) (same); VT. R. CIV. P. 14(a) & reporter's notes (same).

222. Under Louisiana law, failure to use impleader does not affect the right of a party to bring an independent action against the possible third-party defendant

unless the [third-party defendant] proves that he had means of defeating the action which were not used, because the defendant either failed to bring him in as a third party defendant, or neglected to apprise him that the suit had been brought.

LA. CODE CIV. PROC. ANN. art. 1113.

223. In New Jersey, cross-claims that fall within the "entire controversy doctrine" are compulsory. N.J. CIV. PRAC. R. 4:7-5, 4:27-1(b).

224. New Jersey recognizes a practice, known as the "entire controversy doctrine," which, with few exceptions, requires litigants to raise all claims they have against each other arising from the same controversy. See N.J. CIV. PRAC. R. 4:27-1(b). See generally Comment, *The Entire Controversy Doctrine: A Novel Approach to Judicial Efficiency*, 12 SETON HALL L. REV. 260, 268-75, 279-86 (1982) (describing the entire controversy doctrine and its limitations and exceptions). Although initially a doctrine of compulsory claim joinder, it recently has been expanded to require compulsory party joinder as well. See *Cogdell v. Hospital Center*, 116 N.J. 7, 22-28, 560 A.2d 1169, 1178-79 (1989). If entire controversies truly are to be resolved in one proceeding, expanded compulsory joinder of parties in all probability also would be necessary. See McCoid, *supra* note 152, at 724-28; see also Freer, *supra* note 149, at 837, 841-51 (proposing a broader joinder rule for mandatory party joinder).

Although rarely adopted, the notion that at least transactionally related claims should be compulsory, if not all claims between parties, is not new. See, e.g., Blume, *A Rational Theory for Joinder of Causes of Action and Defenses, and for the Use of Counterclaims*, 26 MICH. L. REV. 1, 57-61 (1927); cf. C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 144-46 (2d ed. 1947) (advocating compulsory joinder); Blume, *Required Joinder of Claims*, 45 MICH. L. REV. 797, 811-12 (1947) (surveying the common situations in which joinder of claims is or may be required); Schopflocher, *What Is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?*, 21 OR. L. REV. 319, 363-64 (1942); Note, *Joinder of Actions*, 40 KY. L.J. 105, 112-13 (1951) (discussing revision of the Kentucky Civil Code to provide for compulsory joinder of claims).

225. The frustration underlying the push toward increased reliance on compulsory joinder of claim rules is well illustrated by Judge Pressler's opinion in *Wm. Blanchard Co. v. Beach Concrete Co.*, 150 N.J. Super. 277, 375 A.2d 675 (App. Div.), *certif. den.*, 75 N.J. 528, 384 A.2d 507 (1977). In that case, a complex multi-claim construction dispute, the court held, in part, that under New Jersey's entire controversy doctrine, two co-defendants who failed to timely assert their claims against each other arising out of the basic controversy had waived those claims. In setting the stage for this conclusion the court remarked:

It is now almost seven years since this litigation was commenced, and although it has grown in complexity, it is today no nearer trial than it was on the day the first complaint was filed. The complex procedural

before the court may enhance the prospects for settlement. On the other hand, this push for efficiency through compulsory joinder compromises the other values associated with the claim joinder rules.<sup>226</sup> It also increases the possibility that parties will forfeit claims by failing to raise them.

### 3. Protecting the Plaintiff's Proprietary Interest in the Litigation

Under the Federal Rules, the plaintiff's claim may cease to be the central focus of the litigation because of the litigation of claims between other parties. To fully protect the plaintiff's interest, one might disallow all claims between other parties. The inefficiency this approach would engender, however, leaves little to commend it. A more limited avenue, followed in a number of states, is to limit the litigation of claims not involving the plaintiff<sup>227</sup> to those related to the lawsuit. This allows for the efficiency of litigating related claims at one time, while

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history of this action and its failure throughout the tortuous course of that history to have reached an adjudication of a single issue on the merits might well serve as a primer demonstrating the endlessly protracted, inordinately wasteful and continuously fragmented judicial process which the explicit procedural reforms of the Judicial Article of the 1947 State Constitution were specifically designed to prevent. Sisyphus, condemned to eternally pushing his rock up the side of the mountain without ever reaching the top, may have been an appropriate metaphorical analogy to the civil justice system of earlier times when multiplicity of actions prevailed and form routinely triumphed over substance. The currency of that analogy here signifies the continued frustration of the goal of affording expeditious substantial justice to litigants on the merits of their controversy and requires reconsideration and restatement of basic principles governing the management of inherently complex litigation.

*Id.* at 283-84, 375 A.2d at 678-79 (footnote omitted).

226. These other concerns are preserving the plaintiff's proprietary interest and litigant control. *See supra* Parts II. A., III. C.; *cf.* Freer, *supra* note 149, at 814 (highlighting the costs associated with forcing the litigation of claims through broader compulsory joinder of claims). In addition, it has been argued that to the extent compulsory joinder rules supplant the common law workings of *res judicata*, the flexibility necessary to respond to the equities of individual cases may be lost. *See* 18 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 148, § 4407 at 51-52. It is not clear, however, that a system of procedural rules supplanting *res judicata* with compulsory joinder requirements inevitably would lack the necessary flexibility. For example, Alaska rules specifically provide that "[t]hese rules are designed to facilitate business and advance justice. They may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work injustice." ALASKA R. CIV. P. 94.

227. Although rare, a number of states limit the claims that can be raised even when the plaintiff is involved directly. *See, e.g.*, CONN. R. CT. § 116 (limiting counterclaims to those that arise out of the transaction that is the subject

also assuring that the claims raised in the litigation do not stray too far from the action envisioned by the original plaintiff.<sup>228</sup>

The costs of this choice primarily are ones of efficiency. The costs saved by having one lawsuit instead of two still may be incurred if some claims cannot be raised because they are not sufficiently related to the proceeding. In addition, if another suit will be required in any event, a party may decide to hold back its related claims as well as unrelated claims in the first action, in order to proceed in a forum of choice.

It is possible that these potential costs are overstated. To the extent a second suit is necessary to litigate an unrelated claim, the additional cost incurred in having two suits instead of one probably will not be that high. To be sure, costs will be added by the fixed costs inherent in adding an independent case to the courts' docket. Beyond that, however, little efficiency is likely to be lost from barring litigation of this claim with an unrelated one, and some efficiency might be gained from avoiding the confusion litigation of an unrelated claim could add to the initial proceeding.

To the extent the necessity of a second suit influences a party to hold back a related claim in the first suit that it otherwise would raise there, the efficiency of resolving an entire controversy at one time is lost. It is uncertain, however, how often this would occur. In many instances the party itself will profit from the litigation of the whole controversy at one time and

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of the plaintiff's complaint); NEB. REV. STAT. § 25-813 (1985) (requiring that counterclaims must be related to the action).

228. For example, in Virginia, joinder of tort claims with contract claims is limited to claims that "arise out of the same transaction or occurrence," VA. CODE ANN. § 8.01-272 (1984), so unrelated claims cannot be brought even though qualifying cross-claims and third-party claims are raised. *Id.* revisors' note. Similarly, several states, such as Rhode Island, Texas, and Utah, retain permissive joinder of claim provisions, like Federal Rule 18(a) before its 1966 amendment, which on the federal level had been read to limit cross-claim and third-party claim joinder to qualifying claims. See R.I. DIST. CT. R. CIV. P. 18; R.I. SUPER. CT. R. CIV. P. 18(a); TEX. R. CIV. P. ANN. 51(a); UTAH CT. R. ANN. 18(a). But compare *Navajo Freight Lines v. Baldonado*, 90 N.M. 264, 266-67, 562 P.2d 497, 499-500 (1977) (reading New Mexico's permissive joinder of claims provision, which mirrors Federal Rule 18(a) before its amendment, to allow joinder of a claim for individual damages with an impleader claim) with *Hancock v. Berger*, 77 N.M. 321, 325, 422 P.2d 359, 362 (1967) (suggesting that upon timely objection the same New Mexico rule precludes joining a non-qualifying claim with a proper impleader claim). In addition, several states have joinder of claim provisions that have been read to prohibit joining qualifying and non-qualifying claims in impleader actions. See, e.g., *Ketcham v. CON-RAIL*, 146 Ill. App. 3d 196, 200, 496 N.E.2d 1104, 1107-08 (1986); *Frank v. Art's-Way Mfg. Co.*, 262 N.W.2d 584, 586 (Iowa 1978).

will raise the related claim irrespective of the second suit. If the problem still seems significant, the provision limiting parties to the assertion of related claims could make their assertion compulsory.

#### 4. Equal Ownership of the Forum — Unlimited Joinder

Under the Federal Rules, once a party has filed a qualifying claim, when one is required, the party then is allowed unlimited joinder of claims.<sup>229</sup> If one believes the rhetoric that no harm comes from pleading claims together, only trying them together,<sup>230</sup> then nothing stands in the way of unlimited joinder. Rather than worry about qualifying claims, a system may provide simply that any party may plead any claim against any other party. Although no state has gone quite this far, several have come close.<sup>231</sup>

I suspect the Federal Rules do not do so for several reasons. First, the Rules need to set a standard that works automatically most of the time without court intervention. The Rules attempt to provide a rough guide for what claims usually should be heard together. If free joinder would lead to many motions for severance or separate trial, when more limited joinder would not, limited joinder makes sense.

Second, if the law of inertia works in litigation as it does in the physical world, whatever is pleaded is likely to stand, with a person opposing joinder given the burden of getting the court to exercise its discretion to sever the claims. We thus should set our pleading rules at a level of joinder that will be optimal in most cases.<sup>232</sup>

Finally, if freedom to join any claim regardless of its relationship to the other claims in the action is extended to all claimants, problems of a plaintiff becoming a bystander increase when claims not involving the plaintiff proliferate.

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229. See *supra* notes 112-14 and accompanying text.

230. See *supra* note 185 and accompanying text.

231. For example, in Indiana, Illinois, and New York, only impleader claims are transactionally limited; counterclaims, cross-claims and claims between plaintiffs and third-party defendants are not. IND. R. OF TRIAL P. 13(a), (b), (g), 14; ILL. CODE CIV. P. § 2-406(b) (impleader and related claims), 2-608 (cross-claims and counterclaims); N.Y. CIV. PRAC. L. & R. §§ 1007-09 (impleader and related claims), § 3019(a) (counterclaim), § 3019(b) (cross-claim).

232. Cf. Frank, *The Rules of Civil Procedure — Agenda for Reform*, 137 U. PA. L. REV. 1883, 1888 (1989) (arguing that Rule 14 should be amended to require severance of certain impleader claims because the Rule's current permissive provision does not lead to severance often enough).

## 5. Summary

As highlighted by this survey of state practices regarding multi-claim litigation, many states deviate substantially from the federal model. Substantial variations exist among the state approaches to multi-claim litigation as well. The different approaches adopted reflect different policy trade-offs. A comparative study of the satisfaction with and efficacy of the states' differing approaches as perceived by lawyers, clients, and courts would provide invaluable background for the reassessment of the multi-claim provisions of the Federal Rules.<sup>233</sup>

## CONCLUSION

The current Federal Rules dealing with multi-claim litigation at best are misleading and at worst are misguided. At a minimum, the Rules should be amended to cure their current ambiguity.

More broadly, however, the time may be ripe to reassess the policy compromises that underlie the Rules. Given the current movement in the federal courts toward a more centralized resolution of complex controversies, perhaps the current limitations on claim joinder should be lifted, allowing free joinder of all claims. In addition, the requirement that related claims must be raised could be expanded, thus requiring all parties to raise all claims involved in the basic controversy, and leaving severance or separate trials as the method to protect the plaintiff's proprietary interest in the litigation. In assessing whether such a change is advisable, future rule drafters should learn from the experiences in the states. State approaches vary widely, giving differing weights to the competing policies involved. They provide a rich base of experience from which to assess possible changes in the federal approach to multi-claim litigation. Whether language reform or changing the policy mix of the Rules ultimately is pursued, the goal must be to better and more simply explain the rights and duties of parties involved in multi-claim litigation. The current complexity of multi-claim litigation in the federal courts makes this a most urgent goal.

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233. One possible approach is to survey those litigators who practice in state court in New York and New Jersey and in federal court as well. New York provides a model of a permissive joinder approach to multi-claim litigation, while New Jersey takes a compulsory joinder approach. *See supra* notes 215, 224, 231. The Federal Rules approach falls between the two. FED. R. CIV. P. 13(a), (b), (g), 14.