§ 17:34. Counterclaims, cross-claims, third-party practice, ..., 3 Pattern Discovery...

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Pattern Discovery: Tort Actions
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Chapter 17. Defendant's Case
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—Counterclaims and cross-claims—Checklist

1. A counterclaim is usually a claim by the defendant against the plaintiff, while a cross-claim is usually brought by one defendant against another, Fed. R. Civ. P. 13:
   (a) where there are multiple parties, however, it is possible to have counterclaims between any opposing parties and cross-claims between two parties on the same side of the case;
   (b) diagramming the relationships between the claims and parties may help keep them straight.

2. Under the Federal Rules of Civil Procedure certain counterclaims must be asserted to avoid later application of res judicata (claim preclusion) to bar the claim even though it was never raised:
   (a) these are known as compulsory counterclaims;
   (b) the compulsory counterclaim arises out of the same transaction or occurrence as the opposing party's claim, otherwise it is "permissive";
   (c) there are exceptions to the compulsory rule where:
      (1) the counterclaim would require the presence of additional parties over whom the court lacks personal jurisdiction,
      (2) the claim is already the subject of another action, or
      (3) the claim is based on other than personal jurisdiction (i.e., in rem or quasi in rem).

3. A party may raise any unrelated claim against an opposing party by way of a permissive counterclaim:
   (a) the relief sought by the counterclaim may exceed the original claim or be altogether different in kind;
   (b) some courts require that the permissive counterclaim, standing alone, must meet that court's subject matter jurisdiction requirements, while others treat permissive counterclaims as within their ancillary jurisdiction;
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(c) the advantage of the permissive counterclaim is that, as long as the parties are already before the court, they may have the court resolve other claims between the parties:

1. a party may turn a threatened liability into a possible recovery,

2. the counterclaim changes the settlement value of the case,

3. but the counterclaim is also likely to increase the case's complexity and legal costs.

4. The form of the counterclaim or cross-claim should:

(a) follow the form of the complaint;

(b) state the jurisdictional basis, venue, parties, facts, and relief sought;

(c) each claim should be separately stated and clearly identified as a counterclaim or cross-claim.

5. A counterclaim should be served with the party's responsive pleading (e.g., answer), except that a claim which matures or is acquired later may, by leave of court, be raised in a supplemental pleading:

(a) a party can also move the court for permission to assert a neglected counterclaim by moving to amend an earlier pleading, if the party can show oversight, inadvertence, excusable neglect, or that justice requires permission to amend.

6. All cross-claims are permissive and must arise out of the same transaction or occurrence as the original action or counterclaim:

(a) the cross-claim may seek to hold a co-party liable for all or part of the alleged liability of the cross-claiming party;

(b) a cross-claim which is contingent upon the outcome of the case may also be asserted, e.g., a claim for contribution or indemnification;

(c) some courts prohibit cross-claims between plaintiffs unless the defendant has counterclaimed, to avoid manufactured jurisdiction (where the dispute is really between plaintiffs);

(d) consider the possible negative effects of a cross-claim carefully before filing:

1. it may set natural allies against each other,

2. it may create possibilities for the opposing party to benefit from discovery between the co-parties, and

3. the cross-claim may distract the co-parties from defending the original claim.

7. A counter or cross-claim may lead to the joinder of additional parties under Fed. R. Civ. P. 19 and 20:

(a) but a "counter" or "cross" claim solely against new parties is not appropriate;

(b) consider a third-party claim.

8. The counter or cross-claim may be severed for trial, Fed. R. Civ. P. 42(b):
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(a) counterclaims, cross-claims, or any other sort of third-party practice can quickly make a case incomprehensible for a jury;

(b) extra care must be taken to explain and simplify the case for trial.

9. The court may retain jurisdiction to rule upon the counter or cross-claim, even if the original claim is dismissed or otherwise disposed of.

10. Once a counter or cross-claim enters the case, organize discovery, motion practice, and trial preparation to develop both the original case and the additional claims:

(a) it is too easy to concentrate exclusively on one part of the case;

(b) it may be simplest to treat the counter or cross-claim as a separate case to be prosecuted like any other, rather than as a subsidiary of the original case.

11. The court should consider the...