

Alabama Rules of Civil Procedure

III. PLEADINGS AND MOTIONS

Rule 13.

Counterclaim and cross-claim.

(a) *Compulsory counterclaims.* A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if: (1) at the time the action was commenced the claim was the subject of another pending action; or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13; or (3) the opposing party's claim is for damage covered by a liability insurance policy under which the insurer has the right or the obligation to conduct the defense. In the event an otherwise compulsory counterclaim is not asserted in reliance upon any exception stated in paragraph (a), relitigation of the claim 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.

(b) *Permissive counterclaims.* A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) *Counterclaim exceeding opposing claim.* A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party. All counterclaims other than those maturing or acquired after pleading shall relate back to the time the original plaintiff's claim arose.

(d) *Counterclaim against the State of Alabama.* These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the State of Alabama or an officer or agency thereof.

(e) *Counterclaim maturing or acquired after pleading.* A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) *Omitted counterclaim.* When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.

(g) *Cross-claim against co-party.* A pleading may state as a cross-claim any claim by one party against a co-party 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. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) *Joinder of additional parties.* Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

(i) *Separate trials; separate judgments.* If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

(j) *Appealed actions.* Where an action is commenced in a court from which an appeal lies to the circuit court for a trial de novo any counterclaim made compulsory by subdivision (a) of this rule shall be stated as an amendment to the pleading within thirty (30) days after the appeal has been perfected to the circuit court or within such further time as the court may allow; and other counterclaims and cross-claims shall be permitted as in an original action. When a counterclaim or cross-claim is asserted by a defendant in an appealed case, the defendant shall not be limited in amount to the jurisdiction of the lower court but shall be permitted to claim and recover the full amount of its claim irrespective of the jurisdiction of the lower court. If the plaintiff appeals a case to the circuit court from a lower court and obtains a trial de novo in the circuit court, the plaintiff shall be limited in the amount of his recovery to the jurisdictional amount that could have been claimed and recovered in the lower court, unless the defendant asserts a counterclaim in excess of the jurisdictional amount of the lower court. If a defendant appeals to the circuit court from a judgment rendered by a lower

court, the plaintiff in the circuit court on a trial de novo shall be permitted to claim and recover the full amount of its claim even though the amount might exceed the jurisdiction of the lower court. For purposes of this Rule 13(j), the word "appeal" includes petition for writ of certiorari.

(dc) *District court rule.* Rule 13 applies in the district court except that, (1) Rule 13(a) is modified so as to excuse the pleader from asserting a compulsory counterclaim when the claim is beyond the jurisdiction of the district courts and, (2) Rule 13(j), Appealed Actions, is deleted.

[Amended eff. 10-1-95.]

Committee Comments on 1973 Adoption

This rule addresses itself to two types of claims for relief, counterclaims against opposing parties and cross-claims against co-parties.

Rule 13(a) deals with compulsory counterclaims and requires their assertion in mandatory terms through the language "(a) pleading *shall* state, etc." Emphasis added.

Certain exceptions are created within the rule which dispense with the mandatory requirement. This rule adds to the exceptions contained in the Federal Rule an additional exception which covers claims of a defendant whose defense will be managed by a liability insurer. See Vermont and Maine Rules 13(a). This exception preserves to the defendant the practical opportunity of obtaining independent counsel to pursue an affirmative claim. If such claims were compulsory they would either be handled by the insurance company's counsel, with the attendant possibility of a conflict of interest, or the trial would be encumbered by the presence of two counsel, with possible confusion as to the right to control the presentation of the case. Of course, nothing precludes the assertion of the claim as a permissive counterclaim. Despite the permissive nature of such claims, judgment against the insured defendant may still preclude a subsequent affirmative action against the plaintiff. This is so, not because of the Rule, but because facts crucial to the affirmative claim that have been determined adversely to defendant in the prior suit may not be relitigated by virtue of that branch of res judicata called collateral estoppel, or estoppel by judgment. See *Crowder v. Red Mountain Mining Co.*, 127 Ala. 254, 29 So. 847 (1900) wherein the bar to subsequent proceedings was said to reach any matter which might or ought to have been litigated. See also, *A.B.C. Truck Lines, Inc. v. Kenemer*, 247 Ala. 543, 25 So.2d 511 (1946).

Rule 13(a)(4) also states an exception not found in the Federal Rule. Since Rule 1 provides that these Rules shall be applicable to all courts having a direct appeal to the Supreme Court or the Court of Civil Appeals, it is possible for these rules to be applicable in certain inferior courts. This subparagraph excuses the pleader from setting forth what otherwise might be a compulsory counterclaim in the event the claim exceeds the jurisdictional amount of the court in which the action is pending. Of course, the same admonition concerning the doctrines of res judicata or collateral estoppel by judgment discussed in the preceding paragraph and referred to in the Rule is to be heeded.

Some claims which may be asserted as counterclaims under Rule 13 could heretofore have been interposed by way of recoupment or setoff at law, or by cross-bill in equity. But the counterclaim procedure here provided is so much more extensive than those former Alabama practices, that it is not worthwhile to list the respects in which this rule changes existing law. In general, the scheme of the rule is that any claim whatever which any party has against any opposing party may be asserted as a counterclaim. Rule 13(a), (b). It is immaterial whether the counterclaim is legal or equitable or in contract or in tort, or even whether it has any connection whatever with the plaintiff's claim. 6 Wright & Miller, *Federal Practice and Procedure*, § 1410 (1971). The counterclaim may ask for more or different relief than that sought by the opposing party, it need not run for all the parties on one side and against all the parties on the other, and it need not tend to diminish or defeat the recovery sought by the opposing party. Rule 13(c). Additional parties may be brought in to defend against the counterclaim where their presence is necessary for the granting of complete relief. Rule 13(h); 6 Wright & Miller, *Federal Practice and Procedure*, § 1434 (1971).

Though any claim against an opposing party may be presented as a counterclaim, the rule also provides that such a claim must be pleaded as a counterclaim if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. Rule 13(a). The purpose of this provision is to avoid circuitry of actions, and to require assertion as counterclaims of those claims which are likely to turn on the same facts as the original claim. A counterclaim is compulsory if there is any logical relation of any sort between the original claim and the counterclaim. *Revere Copper & Brass, Inc. v. Aetna Cas. & Surety Co.*, 426 F.2d 709 (5th Cir.1970); *Diamond v. Terminal Ry. Alabama State Docks*, 421 F.2d 228 (5th Cir.1970), cert. denied 397 U.S. 1079, 90 S.Ct. 1531, 25 L.Ed.2d 815; *United Artists Corp. v. Masterpiece Productions, Inc.*, 221 F.2d 213, 216 (2d Cir.1955); *Martin v. Morse Boulder Destructor Co.*, 221 F.2d 218, 222 (2d Cir.1955); *E.J. Korvette Co., Inc. v. Parker Pen Co.*, 17 F.R.D. 267, 268 (S.D.N.Y.1955); *Douglas v. Wisconsin Alumni Research Foundation*, 81 F.Supp. 167, 170 (N.D.Ill.1948); 3 Moore's *Federal Practice*, ¶ 13.13 (2d ed. 1968); 6 Wright & Miller, *Federal Practice and Procedure*, § 1410 (1971). If the pleader

neglects to assert a compulsory counterclaim, the court can grant leave to amend the pleadings to raise it. Rule 13(f); and see also Rule 60(b)(1). But if it is not asserted, it cannot thereafter be sued on in another action. The rule does not apply the bar to subsequent action if the defendant is before the court only by in rem jurisdiction. In personam jurisdiction is essential before the failure to plead a compulsory counterclaim becomes consequential.

Rule 13(c) contains express consideration of relation back of counterclaims. It has been drawn so as to harmonize with § 6-8-84, Code of Ala.

Rule 13(d). Counterclaims against the state of Alabama have been said to clash with the Alabama Constitution of 1901 and its construction in *State v. Gill*, 259 Ala. 177, 66 So.2d 141 (1953).

Rule 13(g) providing for cross-claims essentially adopts present practice under Equity Rule 26 and extends it to all actions, legal or equitable. Usually cross-claims are pleaded by one defendant against another defendant, although the procedure also is available for claims as between third-party defendants, and as between the plaintiffs if a counterclaim is asserted against them. The cross-claim like any other pleading stating a claim, must be sufficient to show that the claim is one on which relief can be granted. Rule 8(a). The usual rules about counterclaims apply, and the party against whom a cross-claim is asserted must plead as a counterclaim any right to relief he has against his co-party which arises from the same transaction or occurrence. Rule 18(a). A cross-claim must demand relief; it cannot be pleaded to assert merely that the cross-claimant is blameless and that his co-defendant is liable to the plaintiff. *Dunbar & Sullivan Dredging Co. v. John R. Jurgensen Co.*, 396 F.2d 152 (6th Cir.1968); *Washington Building Realty Corp. v. People's Drug Stores, Inc.*, 161 F.2d 879 (App.D.C.1947). A cross-claim may be asserted as a matter of right, and no leave of court is required. It must either (1) arise out of the transaction or occurrence that is the subject matter of any existing claim or counterclaim in the suit, or (2) relate to any property that is the subject matter of the original action. A cross-claim may assert that the co-party "is or may be liable" to the cross-claimant. This language permits acceleration of liability by the cross-claim, much as does the similar language in Rule 14. On cross-claims generally see 3 Moore's *Federal Practice*, ¶¶ 13.34-13.38 (2d ed. 1968); 1 Wright & Miller, *Federal Practice and Procedure*, § 1431 (1971). Alabama has previously adopted cross-claim practice through Tit. 7, § 259(1), Code of Ala. The checkered career of this statute is more graphically depicted in the commentary to Rule 14, third party practice.

As to the application of venue requirements to an additional party brought in to defend against a counterclaim pursuant to Rule 13(h), see Rule 82.

Rule 13(j) has no federal counterpart. The first sentence is based on Vermont Rule 13(j). The intent of the remaining portion of Rule 13(j) is evident from a reading of same. If counterclaims in appealed actions are going to be compulsory, it certainly should follow that the defendant should be permitted to recover his full damage even though it exceeded the jurisdiction of the lower court. The last sentence of Rule 13(j) provides that when a defendant appeals a case from a lower court to the circuit court and obtains a trial de novo, the plaintiff then could recover an amount in excess of the jurisdiction of the lower court. In many cases, in order to bring the case in one of the lower courts, a plaintiff will waive a portion of his claim for a quick and inexpensive trial. The defendant then appeals the case to the circuit court often for the purpose of delaying the collection of the judgment well knowing that there is a lid on the amount of the plaintiff's recovery. In such cases, the plaintiff will be entitled to claim and recover the full amount of his damages in the circuit court. Such a rule, no doubt, would prevent many cases from being appealed to the circuit court either for the purpose of delay only or for the purpose of securing a second trial knowing that he has all to gain and nothing to lose by so doing. The same logic would not apply if the plaintiff appealed and the suggested rule provides that should he appeal he would be limited to the jurisdiction of the lower court, except when defendant asserts a counterclaim in excess of the jurisdictional amount of the lower court.

Committee Comments to October 1, 1995, Amendment to Rule 13

The amendment deletes subdivision (4) of subparagraph (a). Subdivision (4) provided an excuse from the obligation to serve a compulsory counterclaim when the claim exceeded the jurisdictional amount of an inferior court having direct appeal to the Supreme Court or the Court of Civil Appeals. Such inferior courts no longer exist. Before the repeal of the Judicial Article of the Alabama Constitution of 1901 by Amendment No. 328, there were several inferior courts with direct appeal to the Supreme Court. Section 12-12-72, Code of Alabama 1975, deals with appeals from a district court by agreement of the parties after judgment, a matter different from that for which former Rule 13(a)(4) was drawn.

The amendment to paragraph (dc) preserves the exception from the obligation to serve a compulsory counterclaim where the claim exceeds the jurisdictional amount of the district court, notwithstanding the accompanying revision of Rule 13(a).

District Court Committee Comments

While an examination of the Judicial Article Implementation Act and, specifically, Sec. 4-102(a)(2), gives the implication that the legislature intended that the compulsory counterclaim rule apply in the district courts, some risks attend the availability of the compulsory counterclaim in the district court. In those instances where the defendant may not be represented by counsel, the bar resulting from the omission of a compulsory counterclaim could constitute a trap for the unwary. In that connection, treatment of the bar as an estoppel rather than as res judicata affords a safety valve to the defendant who fails to assert a compulsory counterclaim under circumstances where his culpable conduct in failing to assert the counterclaim is insignificant. For a discussion of the concept of estoppel in this connection, see 1 Lyons, *Alabama Practice*, Sec. 13.8, p. 249 (1973).

For the equitable jurisdiction of the district court, see the comments to Rule 2(dc).

The assertion of a compulsory counterclaim to the extent of the plaintiff's claim may preclude a subsequent action in the circuit court or in the district court for the residue. See *South & N. Ala. R.R. v. Henlein*, 56 Ala. 368 (1876). As is the case in the circuit court, the determination that results from the plaintiff's claim in the district court may preclude the defendant from proceeding with a claim for affirmative relief in another court if the claim in the district court is resolved in favor of the district court plaintiff. The fact that the initial claim against the defendant arose in a court of intermediate civil jurisdiction did not prevent the doctrine of res judicata from applying in *Logan v. O'Barr*, 271 Ala. 94, 122 So.2d 376 (1960).

The deletion of Rule 13(j), *Appealed Actions*, has been recommended only because Rule 13(j), by its terms, is applicable only in the circuit court.