THE MISGUIDED LAW OF COMPULSORY COUNTERCLAIMS IN DEFAULT CASES

Todd David Peterson*

Every federal court that has addressed the issue has held that Rule 13(a) of the Federal Rules of Civil Procedure bars a defendant who defaults and fails to file a timely answer to a complaint from later filing a transactionally related claim in a subsequent suit. This Article argues that the federal courts' interpretation of Rule 13(a) is fundamentally wrong. The interpretation appears to be rooted in docket-clearing interests, rather than the text of Rule 13(a) itself or the history and policies underlying the rule. The history of preclusion law shows that defendants traditionally have been accorded the autonomy to bring their claims in the forum of their choice. The federal rules drafters carved out a narrow exception to the traditional rule and required defendants who file answers to assert any transactionally related claim they wished to pursue. The rule on its face, however, applies this exception only when defendants actually file an answer. The decisions applying the rule to defaulting defendants not only ignore the clear language of the rule, they also fail to serve the rule's purpose while needlessly penalizing defendants who unintentionally default, as well as defendants who wish to pursue their own claims elsewhere. These decisions are either poorly reasoned or fail even to discuss the issue at all, and they should now be abandoned.

INTRODUCTION

If you ask a typical Civil Procedure professor whether a defendant who defaults on a claim is banned from bringing a claim that would have been a compulsory counterclaim if the case had proceeded to the answer stage, you are likely to get a quick answer: "No, Rule 13(a) says that the obligation to file a transactionally related counterclaim arises under the terms of 13(a) only when the defendant files a pleading."[1]

Indeed, many professors consider this to be a particularly useful final exam question to test whether the students have carefully read the text of Rule 13(a). Imagine the professors' surprise when they learn that their view of Rule

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* Professor of Law, The George Washington University Law School.

1. FED. R. CIV. P. 13(a)(1)–(a)(1)(A) ("A pleading must state as a counterclaim any claim that—*at the time of its service*—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . ." (emphasis added)).

13(a) is not shared by the federal courts. Several federal cases have held that a defendant who defaults is later precluded from filing a transactionally related claim in a subsequent suit,[2] and not a single federal court has held to the contrary. The professors may be excused for failing to know the caselaw, and relying on the apparent meaning of the written language of Rule 13(a), when some casebook authors make the same mistake.[3] Even the venerable Wright and Miller come to opposite conclusions about this question in different parts of their multi-volume treatise.[4]

This confusion is understandable given the apparent conflict between the clear language of Rule 13(a) and the decisions that have considered whether

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2. *See, e.g.*, Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 160 (2d Cir. 1992) (holding that a defaulting party's claim was barred as a compulsory counterclaim under Rule 13(a)); Carteret Sav. & Loan Ass'n, F.A. v. Jackson, 812 F.2d 36, 38–39 (1st Cir. 1987) (holding that Rule 13(a) bars all the claims of a defaulting defendant that would have been compulsory counterclaims); Brown v. McCormick, 608 F.2d 410, 416 (10th Cir. 1979) (applying Rule 13(a) to bar claims that were not raised as part of a proceeding ending in a default judgment).

3. *See* LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 636 illus. 7–23 (3d ed. 2004). In the section on claim joinder, the text notes:

> *P* sued *D* in a U.S. District Court. *D* did not appear or defend the action. The court then entered judgment by default for *P*. Subsequently, *D* sued *P*. *D* asserted a claim against *P* arising out of the same transaction or occurrence as the claim *P* had asserted against *D* in the previous lawsuit. *P* objected that this claim was a compulsory counterclaim in the first action and that the failure to assert it should preclude *D* from asserting it in a separate action. *P*'s objection is unsound. *D* never served a pleading on *P* in the first action. Rule 13(a) only operates when a party serves a pleading on an opposing party.

Id.

4. In the section on compulsory counterclaims, the authors state: "[t]ypically, courts have given default judgments full effect and have held that a counterclaim omitted from an action that terminates in a default judgment will be barred from any subsequent suits." 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1417, at 134 (3d ed. 2001) [hereinafter 6 WRIGHT & MILLER]. However, in the section on defaults, the authors reach the contrary conclusion:

> The policies favoring trial on the merits and limiting the effects of a default judgment also indicate that a defendant who fails to appear or to file a responsive pleading and against whom a judgment is entered under Rule 55(b) should not be prevented from asserting a claim in a later action that would have been a compulsory counterclaim in the action that terminated by default judgment. The compulsory-counterclaim rule itself, Rule 13(a), suggests that this conclusion is sound by stating that defendant's "pleading shall state" any counterclaim defendant may have at that time. Accordingly, if the default judgment precedes defendant's filing of a responsive pleading—even if it occurs following an unsuccessful motion to dismiss—the defaulting defendant may assert the claim in a later action. Conversely, if the default judgment follows the filing of a responsive pleading, an unasserted compulsory counterclaim may not be advanced in a subsequent lawsuit.

10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2681, at 12 (3d ed. 2001) [hereinafter 10A WRIGHT & MILLER].

default judgments bar transactionally related claims. The interesting question is why the courts have reached a conclusion on this issue that seems so at odds with the text of the rule. Indeed, the conclusion reached by the courts is not only textually problematic, it is also unsupported by any of the policies that motivated the rule. The history of Rule 13(a) suggests that the Supreme Court (or the Rules Advisory Committee) designed it to streamline litigation for the benefit of the court system, not to create a right on behalf of the plaintiff to force the resolution of all claims that are transactionally related to the plaintiff's own claim. However, the application of the Rule in default cases does not promote the policy of judicial economy that underlies it. Judicial economy is not ill-served if defendants are allowed to file their own claims in their forum of choice if the initial case is resolved with a default judgment and the expenditure of virtually no judicial resources. Nonetheless, courts have prevented defendants from doing so.

This result is markedly unfair to defendants. First, the outcome is unduly harsh to defendants who default because of neglect or mistake ("unintentional defaulters") and who will be deprived not only of their chance to contest the claim brought against them, but also of their own affirmative claim against the original plaintiff. Second, this approach deprives defendants of the option of defaulting on the original claim in order to bring their own claim in the forum of their choice. These defendants ("strategic defaulters") may conclude that the plaintiff's claim is insignificant, or that they have little chance of prevailing on the merits, and that the benefits of forum choice outweigh the benefits of defending against the plaintiff's claim. A strategic defaulter may simply resist the plaintiff's ploy of filing a minor claim against the defendant in order to deprive the defendant of the choice of forum in which to litigate its own claim.

Interestingly, the rules of claim preclusion, as set forth in the Restatement (Second) of Judgments, allow a defendant to bring even a transactionally related counterclaim in a subsequent suit.[5] The claim preclusion rules expressly acknowledge the importance of a defendant's claim autonomy. Although the federal rules modify this liberal respect for defendants' claim autonomy in favor of a rule that favors judicial economy, the policy underlying Rule 13 hardly warrants its application in default cases, in which a court spends little time and effort on the case.

The cases applying the compulsory counterclaim rule to defaults appear to be part of a larger trend toward broadening the use of the default mechanism to ease the docket pressures on the trial courts, a point that seems particularly disturbing. The federal courts undoubtedly face serious docket congestion and therefore need to search for creative ways to manage ever-increasing caseloads.

This Article argues, however, that the effort to reduce the burden on the trial courts should not come at the price of depriving parties of potentially meritorious claims by manipulating the rules and expanding the preclusive effect of default cases. If defendants are willing to abandon their defense against the plaintiff's claims without a fight, and without the expenditure of any significant

5. RESTATEMENT (SECOND) OF JUDGMENTS § 22(1) (1982).

judicial resources, they should have the right to bring their own claims in the forum of their choice.

This Article examines the issues raised by compulsory counterclaims in default cases by first looking at the general treatment of transactionally related counterclaims under preclusion law and Rule 13 of the Federal Rules of Civil Procedure in order to understand the principles and policies that underlie the current structure of the rules. Part II analyzes the specific issue whether default judgments should bar transactionally related counterclaims under the current language of Rule 13(a). Part III analyzes the caselaw concerning whether transactionally related counterclaims are barred in both default cases and cases dismissed before an answer is filed in the case. Finally, Part IV examines the possible reasons for the courts' treatment of this issue and suggests a different approach to the question of transactionally related counterclaims in default cases.

I. BACKGROUND: COMPULSORY COUNTERCLAIMS UNDER PRECLUSION LAW AND UNDER THE FEDERAL RULES

A. Compulsory Counterclaims Under Preclusion Law

The common law of claim preclusion protects a valid judgment from collateral attack, but does not infringe upon a defendant's freedom to bring its own claim wherever it wishes. Under the law of claim preclusion, as opposed to the Federal Rules of Civil Procedure, a defendant is not required to file even a transactionally related counterclaim when it files its answer. The Restatement (Second) of Judgments states in section 22 that "[w]here the defendant may interpose a claim as a counterclaim but he fails to do so, he is not thereby precluded from subsequently maintaining an action on that claim, except as stated in Subsection (2)."[6] The reporter's comments make it clear that the defendant should have the option to interpose a claim as a counterclaim, or to bring a separate action against the plaintiff.[7] The comments note that "[t]he justification for the existence of such an option is that the defendant should not be required to assert his claim in the forum or the proceeding chosen by the plaintiff but should be allowed to bring suit at a time and place of his own selection."[8] Thus, even in the most common situations where a compulsory counterclaim would be required under the federal rules, such as a traffic accident in which all parties have claims against the others, as a matter of claim preclusion law, a defendant would not be required to file a counterclaim arising out of the same traffic accident as the plaintiff's claim.[9]

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6. *Id.*
7. *Id.* § 22 cmt. a.
8. *Id.*
9. *Id.* Illustration 1 provides:

> A brings an action against B for the negligent driving of an automobile by B resulting in a collision with an automobile driven by A. B fails to plead and judgment by default is given against him. B is not precluded from subsequently maintaining an action against A for his own injuries on the ground that those injuries were the result of A's negligence.

Unsurprisingly then, the Restatement would not bar a transactionally related counterclaim in a default case. The comments note the following classic illustration:

> A, a physician, brings an action against B for the price of medical services rendered to B. B fails to plead, and judgment by default is given against him. B is not precluded from subsequently maintaining an action against A for malpractice relating to the services sued upon in the prior action.[10]

Of course, other preclusion principles may bar a subsequent claim by the defendant in lawsuit one. For example, the comments note that issue preclusion may bar a defendant from bringing its own claim in a subsequent lawsuit if the defendant litigates a defense to the plaintiff's claim in lawsuit one and that defense involves the same issue as the affirmative claim it wishes to bring in lawsuit two.[11] Thus, if B's defense to a claim for medical services rendered is that the services were negligent, and A wins the first suit, B would be precluded from relitigating A's negligence under the doctrine of issue preclusion.[12]

The Restatement rule is also the general rule in the federal court system as a matter of the common law of issue preclusion. For example, in *Mercoid Corp. v. Mid-Continent Investment Co.*,[13] the U.S. Supreme Court stated:

> Though Mercoid [was] barred in the present case from asserting any defense which might have been interposed in the earlier litigation, it would not follow that its counterclaim for damages would likewise be barred. That claim for damages is more than a defense; it is a separate statutory cause of action. The fact that it might have been asserted as a counterclaim in the prior suit by reason of Rule 13(b) of the Federal Rules of Civil Procedure . . . does not mean that the failure to do so renders the prior judgment res judicata as respects it. The case is then governed by the principle that where the second cause of action between the parties is upon a different claim the prior judgment is res judicata not as to issues which might have been tendered but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."[14]

This same rule is followed by many state supreme courts,[15] although not every jurisdiction recognizes the defendant's right to withhold a transactionally

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Id. § 22 cmt. b, illus. 1.

10. *Id.* § 22 cmt. b, illus. 2. The comment does note that "B is precluded, however, from seeking restitution of any amount paid pursuant to the judgment." *Id.*

11. *Id.* § 22 cmt. c.

12. *Id.* § 22 cmt. c, illus. 4.

13. 320 U.S. 661 (1944).

14. *Id.* at 671 (quoting Cromwell v. County of Sac., 94 U.S. 351, 353 (1876)); *see also* Va.-Carolina Chem. Co. v. Kirven, 215 U.S. 252, 257 (1909).

15. *See, e.g.*, Fischer v. Hammons, 259 P. 676, 679 (Ariz. 1927) (holding that where a second action presents a different claim, the first judgment is res judicata as to issues actually decided therein); Vendall, Inc. v. Statler Mfg. Corp., 171 N.Y.S.2d 938, 940

related counterclaim and sue upon it in a later action.[16] In particular, if a defendant actually asserts a defense that could also form the basis of an affirmative claim, some courts bar the defendant from subsequently asserting that claim in a separate lawsuit.[17]

In contrast, the majority approach in the state courts is that in the absence of a compulsory counterclaim rule, the assertion of facts as a defense (and, *a fortiori*, the failure to make such an assertion) does not preclude in a later action the defendant's assertion of a claim based on the same facts. This simple approach is founded upon the principle that fairness to the defendant requires that the defendant be allowed to choose the forum in which to litigate its own claim. The doctrinal explanation is that "a defense and a claim are simply not the same claim in spite of factual identity between them, and thus that the res judicata doctrines of merger and bar are inapplicable."[18]

The significance of the common law preclusion rules in the context of compulsory counterclaims in default cases is two-fold. First, the plaintiff has no "right" to assume that the resolution of its own claim also resolves any claim that the defendant might have against the plaintiff. The preclusive effect of the plaintiff's judgment applies only to the plaintiff's own claim.

Second, the value of the defendant's claim autonomy to file its own claim in the forum of its own choice is regarded as sufficiently substantial to outweigh both the convenience of the plaintiff and the efficiency of the judicial system. Although Rule 13(a) clearly readjusts that balance, it is important to understand the foundation of preclusion law in assessing exactly what changes Rule 13(a) has wrought.

B. Common Law Compulsory Counterclaims

Before we turn to Rule 13(a) it is helpful to examine the one instance in which the common law rules of preclusion will bar a defendant from filing a separate claim later. The common law compulsory counterclaim rule gives further meaning to the rights of plaintiffs and defendants concerning the preclusive effect of a judgment. Even if there is no written compulsory counterclaim rule, the common law preclusion rules may bar a defendant from asserting an affirmative claim in a subsequent action if allowing that claim would effectively nullify the

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(App. Div. 1958); Gwynn v. Wilhelm, 360 P.2d 312, 316 (Or. 1961); Buck v. Mueller, 351 P.2d 61, 63–64 (Or. 1960); Kassien v. Menako, 70 N.W.2d 670, 671 (Wis. 1955).

16. *See* ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 108 (2001).

17. *See, e.g.*, Mitchell v. Fed. Intermediate Credit Bank, 164 S.E. 136, 137–38 (S.C. 1932).

18. CASAD & CLERMONT, *supra* note 16, at 109 (citation omitted). Professors Casad and Clermont go on to state that:

> [T]he thought is that the majority approach is relatively workable and less of a trap for the unwary, that the defendant's interest in selecting the forum for bringing the claim outweighs the undesirability of possibly duplicative litigation, and that here as elsewhere issue preclusion will apply to retrieve in part the policies behind res judicata.

Id.

plaintiff's victory in suit number one. Thus, the Restatement (Second) of Judgments states that:

> A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, after the rendition of judgment in that action, from maintaining an action on the claim if: . . . (b) the 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.[19]

The comments to this section elaborate on the basic rule by noting that:

> For such an occasion to arise, it is not sufficient that the counterclaim grow out of the same transaction or occurrence as the plaintiff's claim, nor is it sufficient that the facts constituting a defense also form the basis of the counterclaim. The counterclaim must be such that its successful prosecution in a subsequent action would nullify the judgment, for example, by allowing the defendant to enjoin the enforcement of the judgment, or to recover on a restitution theory the amount paid pursuant to the judgment . . . , or by depriving the plaintiff in the first action of property rights invested in him under the first judgment . . . .[20]

This principle protects the plaintiff's original judgment by preventing a collateral attack that would not just grant arguably inconsistent relief to the defendant, but would actually undo the effects of the judgment in case one.[21]

One of the well-noted benefits of the common law compulsory counterclaim rule, as set forth in the Restatement (Second), is that it displaces attempts to accomplish the same result through the application of the much broader principle of issue preclusion.[22] The use of issue preclusion principles in such a situation can have particularly drastic consequences in default cases.

For example, in *Gates v. Preston*,[23] the New York high court ruled that a default judgment obtained by a doctor for $6.58 barred a patient from proceeding with his already pending $5,000 action for medical malpractice. The court concluded that issue preclusion "also applies to a judgment by default" because "consent to the entry of a judgment for a certain amount . . . is an admission on the record of all the facts which the plaintiff would have been bound to prove on a denial of the cause of action alleged by him in his complaint."[24] Thus, the court found that, because the doctor's prima facie case for breach of contract would have

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19. RESTATEMENT (SECOND) OF JUDGMENTS § 22(2) and (2)(b) (1982).

20. *Id.* § 22 cmt. f. (internal cross-reference omitted).

21. *See* Kevin M. Clermont, *Common-Law Compulsory Counterclaim Rule: Creating Effective and Elegant Res Judicata Doctrine*, 79 NOTRE DAME L. REV. 1745, 1747 n.7 (2004) (noting that the common law compulsory counterclaim rule was not a part of the original Restatement of Judgments and that it was not even a part of the Reporter's initial submission of the Restatement (Second) to the American Law Institute).

22. *See id.* at 1747–51.

23. 41 N.Y. 113 (1869).

24. *Id.* at 115; *see also* Blair v. Bartlett, 75 N.Y. 150, 155–56 (1878).

required the doctor to prove proper performance of his services, the default judgment precluded the same issue from being litigated in the context of the patient's malpractice action.[25]

In an earlier effort, the Restatement (First) of Judgments dealt with the issue by requiring that an issue actually be litigated and resolved in the first case before it could have a preclusive effect in subsequent litigation.[26] The comments suggest that a default judgment would bar only the assertion of defenses to the original action in a later lawsuit, and would not preclude the original defendant from bringing a transactionally related claim itself.[27]

In contrast, the Restatement (Second) made it clear that a subsequent action by the original defendant would be barred only if it would "inherently undo the first judgment."[28] Commentators have praised the Second Restatement's resolution of this issue for its focused protection of the original judgment while preserving the defendant's claim autonomy and limiting the impact of a default judgment upon the original defendant's right to bring its own claim:

> The virtues of the Second Restatement's resolution are manifold. The formulation is relatively workable. Its narrow scope of preclusion avoids the costs of unnecessarily foreclosing issues and claims that were not actually litigated and determined. Those costs lie not only in the inefficiency of undesirably intensifying the original litigation and in the inaccuracy of fictionally treating as established certain propositions that were never adjudicated, but also in the simple unfairness to the defendant. Under the common-law compulsory counterclaim rule, defendants get better notice of what they will lose by default. Plaintiffs can still seek wider preclusion by an action for declaratory judgment.[29]

Although the Second Restatement's formulation of the common law compulsory counterclaim rule has not persuaded the New York courts to change

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25. *Gates,* 41 N.Y. at 115–16; *see also* Dunham v. Bower, 77 N.Y. 76, 82 (1879) (holding that carrier's judgment for freight charges against a vendor precluded the defendant's later contract action for damages from a delay in the shipment); Clermont, *supra* note 21, at 1748–49.

26. *See* RESTATEMENT (FIRST) OF JUDGMENTS §§ 68, 70 (1942).

27. *Id.* § 47 cmt. e. The comment states:

> Where the plaintiff brings an action upon the judgment, the defendant cannot collaterally attack the judgment. The defendant cannot avail himself of defenses which he might have interposed in the original action. It is immaterial whether he did in fact interpose such defenses in the original action or whether he failed to do so. An action can be maintained upon the judgment even though the defendant defaulted in the original action . . . . In an action on the judgment the defendant may . . . interpose a counterclaim. It is immaterial that he might have interposed a counterclaim in the original action if he did not do so, except whereby statute compulsory counterclaim is provided for.

Id.

28. Clermont, *supra* note 21, at 1753.

29. *Id.* at 1753–54 (footnote omitted).

their expansive view of issue preclusion,[30] "academics and courts, at least outside New York, seem to be increasingly less willing to neglect the actually-litigated-and-determined requirement, which should lead to a decrease in wrongly decided cases."[31]

For example, in *Carey v. Neal, Cortina & Associates*,[32] the Illinois appellate court permitted purchasers of real estate to sue the sellers for fraud, notwithstanding the existence of a prior judgment in Florida state court in which the sellers had foreclosed on the buyer's mortgage for the property. The Illinois court acknowledged that the buyers could have filed a counterclaim in the Florida action based on the seller's alleged fraud,[33] but the court stated:

> In the absence of a statute or rule of court that *requires* defendants to assert their claims as a counterclaim to the plaintiff's lawsuit, the general rule is that the defendant retains the choice of bringing a separate action against the plaintiff instead of filing a counterclaim. Although there is an exception to this general principle, the point is that the defendant generally should not be forced to assert his claims in the plaintiff's forum or proceeding but should be free to bring a separate action.[34]

The court allowed the fraud action to proceed notwithstanding the seller's assertion that the buyer's claim was a common law compulsory counterclaim:

> In light of the pending controversy it could be argued that [the buyers] should have defended against the foreclosure action and asserted fraud as a means of rescinding the real estate transaction. But as long as the pending suit is not a means by which the Florida judgment is nullified, we believe it preferable to allow the suit to proceed. Rather than recision and restitution, plaintiffs are seeking damages arising out of a fraudulent scheme that the [sellers] allegedly perpetrated. Their strategy may actually promote judicial economy, since the presentation of their proofs of fraud may now occur at one time in one place against all defendants who allegedly participated in the scheme.[35]

The *Carey* case is a good example of a court's sensitivity in applying the common law compulsory counterclaim rule. The court looked to the issue of whether a judgment for the buyers in case two would nullify the seller's judgment in case one, rather than focusing on whether the rationale of a judgment for the buyers would be inconsistent with the unlitigated rationale for the seller's judgment in the original case. In *Carey*, the court respected the buyers' autonomy to bring their affirmative claim in their home state forum and carefully evaluated

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30. *See* Harris v. Stein, 615 N.Y.S.2d 703, 705 (App. Div. 1994) (holding that doctor's default judgment in breach of contract claim for medical services collaterally estopped patient's subsequent malpractice claim).

31. Clermont, *supra* note 21, at 1758.

32. 576 N.E.2d 220, 228 (Ill. App. Ct. 1991).

33. *Id.* at 223.

34. *Id.* (citation omitted).

35. *Id.* at 228.

whether allowing that claim to proceed would, in fact, involve a waste of judicial resources.

Thus, the rules outlined by the Restatement (Second) of Judgments protect a valid judgment from collateral attack while preserving the defendant's right to bring its own affirmative claim in its chosen forum. Although the Second Restatement's emphasis on claim autonomy has been limited by the application of Rule 13(a), it is important to recall the common law rules of preclusion in order to remember that a defendant's claim autonomy is not without value, and that the rule should be read carefully so as not to tread upon this right in instances where neither the language of the rule nor the policy of judicial economy compels the result. This principle is particularly important in default cases in order to give effect to the initial judgment while preserving the defaulting party's right to bring its own affirmative claim.

C. The Compulsory Counterclaim Rule—Federal Rule 13(a)

The Restatement (Second) of Judgments' generous approach to a defendant's claim autonomy was, of course, greatly modified by the drafters of the Federal Rules of Civil Procedure, and the states that have adopted similar rules for their own systems. Rule 13(a) states:

> A pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction. (2) Exceptions. The pleader need not state the claim if: (A) when the action was commenced, the claim was the subject of another pending action; or (B) the opposing party sued on its claim by attachment or other process that did not establish personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.[36]

Although the rule trumps the common law rules of preclusion that favor a defendant's claim autonomy, it is important to understand the origin and purpose of Rule 13(a) in order to determine just how far it sweeps in altering the rights of defendants to pursue their own claims in the forum of their choice.

The origins of Rule 13(a) date back to the Federal Rules of Equity and, before that, to common law and code pleading antecedents.[37] The counterclaim practice set forth in Rule 13 is a continuation and extension of the code counterclaim, which in turn had its basis in the common law doctrines of set-off and recoupment.[38]

At common law, courts did not determine whether defendants were required to bring a counterclaim, but rather whether they were even permitted to file their own claim against the plaintiff. Courts permitted these counterclaims only

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36. FED. R. CIV. P. 13(a).
37. *See* 6 WRIGHT & MILLER, *supra* note 4, § 1401, at 12.
38. *See id.* at 11.

if they fell within the rubric of recoupment or set-off.[39] The term "recoupment" described a claim that the defendant could assert against the plaintiff only if it arose from the same transaction as plaintiff's claim.[40] It was purely defensive in character and could be used only to defeat or to diminish the plaintiff's recovery; recoupment could not be the basis for affirmative relief.[41] "Set-off," on the other hand, referred to a claim by the defendant that was unrelated to the plaintiff's claim.[42] Moreover, unlike recoupment, set-off permitted the defendant to assert an affirmative claim for relief.[43]

However, the utility of set-off was limited by the requirement that the claim either be for a liquidated amount or arise out of a contract or judgment.[44] Wright and Miller note that:

> Both the common law doctrines of recoupment and set-off were adopted in modified form by the early codes in the United States. . . . However, the code counterclaim was more widely available than either of its common law predecessors because the codes permitted a grant of affirmative relief if the counterclaim proved successful and eliminated the absolute requirement that the set-off be for a liquidated amount.[45]

The modern term, counterclaim, was not introduced until the mid-19th century with the development of code pleading.[46] The term "counterclaim" first appeared in the 1852 amendments to the original New York Code of 1849.[47] At this time, the counterclaim was purely permissive. Under the code provisions, courts would not even permit a counterclaim unless it arose out of the same contract or transaction as set forth in the plaintiff's claim or, if the action was for breach of contract, it arose out of any other contract between the parties existing at the time the plaintiff filed his complaint.[48]

There is surprisingly little history, however, on the origins of the compulsory counterclaim rule. Professor Wright noted that "[t]he compulsory counterclaim rule is a lineal descendant of Federal Equity Rule 30 and of

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39. *See id.* at 10.

40. 3 THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 1042, at 2177–80 (Joseph H. Beale & Arthur G. Sedgwick eds., 9th ed. 1912); 3 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1878, at 479–80 (14th ed. 1918).

41. 3 SEDGWICK, *supra* note 40, § 1049, at 2184; 3 STORY, *supra* note 40, § 1878, at 479–80.

42. OLIVER L. BARBOUR, TREATISE ON THE LAW OF SET OFF 22–26 (1841); 3 SEDGWICK, *supra* note 40, § 1033, at 2159.

43. 3 SEDGWICK, *supra* note 40, § 1033, at 2159; 3 STORY, *supra* note 40, § 1870, at 471.

44. THOMAS W. WATERMAN, TREATISE ON THE LAW OF SET-OFF, RECOUPMENT, AND COUNTER-CLAIM §§ 302–03 (New York, Baker, Voorhis 2d ed. 1872).

45. 6 WRIGHT & MILLER, *supra* note 4, § 1401, at 10–11.

46. William H. Lloyd, *The Development of Set-Off*, 64 U. PA. L. REV. 541, 563 (1916).

47. Act of Apr. 16, 1852, ch. 392, §§ 149–50, 1852 N.Y. Laws 654; *see also* Lloyd, *supra* note 46, at 563–64.

48. Lloyd, *supra* note 46, at 564.

American statutes going back to 1875."[49] As the Advisory Committee Notes suggest, "[t]his is substantially [former] Equity Rule 30 (Answer-Contents-Counterclaim), broadened to include legal as well as equitable counterclaims."[50] Wright and Miller note that: "Federal Rule 13 is a broadened version of former Equity Rule 30," which was strictly limited to equitable claims.[51]

Rule 13 simply refers to a "pleading," which makes obsolete those pre-1938 decisions based on the narrow reading of the language of Equity Rule 30. The present rule also gives the right to counterclaim to any "opposing party."[52] In contrast, Equity Rule 30 provided that a counterclaim be made in the "answer," and some courts held that an intervening defendant could not assert a counterclaim, because his pleading was not an answer,[53] or that the plaintiff could not present a counterclaim in the reply.[54]

In 1963, the Supreme Court amended Rule 13(a) by adding an exception to compulsory counterclaims in those suits brought either on an in rem or quasi in rem basis and in which the court did not obtain personal jurisdiction over the defendant. Wright and Miller explain that "[t]his exception became necessary because of the simultaneous amendment of Rule 4(e) which provided for the institution of federal actions pursuant to state statutes authorizing the attachment or garnishment of a non-residence property."[55] These exceptions to the compulsory counterclaim underscore the respect that even the federal rules drafters had for a defendant's claim autonomy in an instance in which the plaintiff's entire claim was not being litigated on the basis of full in personam jurisdiction. Rule 13 did not completely reject any right of the defendant to file in the jurisdiction of its choice.

The states quickly began to adopt the federal model. By 1954, by one scholar's account, seventeen jurisdictions, as well as the federal courts, had some form of compulsory counterclaim.[56] Currently, only nine states do not have a form of the compulsory counterclaim rule.[57] Twenty-five states have adopted the federal

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49. Charles Alan Wright, *Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading*, 38 MINN. L. REV. 423, 449 n.121 (1954).

50. FED. R. CIV. P. 13 advisory committee's note 1.

51. 6 WRIGHT & MILLER § 1401, *supra* note 4, at 12 (stating that Equity Rule 30 "provided that the answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit . . . and also allowed a set off or counterclaim against the plaintiff which might be the subject of an independent suit in equity") (internal quotation marks omitted).

52. FED. R. CIV. P. 13(b); *see* 6 WRIGHT & MILLER, *supra* note 4, § 1401, at 12–13.

53. Chandler & Price Co. v. Brandtjen & Kluge, Inc., 296 U.S. 53, 58 (1935).

54. Proctor & Gamble Co. v. J. L. Prescott Co., 59 F.2d 773, 774 (D.N.J. 1932).

55. 6 WRIGHT & MILLER, *supra* note 4, § 1401, at 14.

56. Wright, *supra* note 49, at 427.

57. These states are: Connecticut, *see* CONN. PRACTICE BOOK § 10-10; Illinois, 735 ILL. COMP. STAT. 5/2-608 (2007); Maryland, MD. R. CIV. P. 2-331(a); Nebraska, NEB. REV. STAT. § 25-701 (2007); New York, N.Y. C.P.L.R. § 3019(a) (Consol. 2008); Oregon, OR. R. CIV. P. 22A(1); Pennsylvania, PA. R. CIV. P. 1031(A); Virginia, VA. SUP. CT. R. 3:9(a); and Wisconsin, WIS. STAT. § 802.07(1) (2006).

rules provision with respect to compulsory counterclaims.[58] The remaining sixteen states have some form of compulsory counterclaim rule, but the rule does not closely follow the federal model.[59]

Notwithstanding the failure of the rule to specify the penalty for failing to assert a compulsory counterclaim, "it has never been doubted in any of the jurisdictions which have adopted such a rule that the pleader who fails to comply therewith is prohibited from subsequent assertion of his claim."[60] Professor Wright notes that a preliminary draft of the federal rules provided that "[i]f the action proceeds to judgment without such a claim being set up, the claim shall be barred," but this provision was eliminated from the rule that was eventually adopted.[61] Note

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58. These states are: Alaska, ALASKA R. CIV. P. 13(a); Arizona, ARIZ. R. CIV. P. 13(a); Arkansas, ARK. R. CIV. P. 13(a); Colorado, COLO. R. CIV. P. 13(a); Florida, FLA. R. CIV. P. 1.170(a); Georgia, GA. CODE ANN. § 9-11-13(a) (2008); Hawaii, HAW. R. CIV. P. 13(a); Idaho, IDAHO R. CIV. P. 13(a); Indiana, IND. R. TRIAL P. 13(a); Kansas, KAN. STAT. ANN. § 60-213(a) (2006); Kentucky, KY. R. CIV. P. 13.01; Montana, MONT. R. CIV. P. 13(a); Nevada, NEV. R. CIV. P. 13(A); New Mexico, N.M. R. CIV. P. 1-013(A); North Carolina, N.C. GEN. STAT. § 1A-1 R. 13(a) (2007); North Dakota, N.D. R. CIV. P. 13(a); Ohio, OHIO CIV. R. 13(a); Oklahoma, OKLA. STAT. tit. 12, § 2013(A) (2008); South Carolina, S.C. R. CIV. P. 13(a); South Dakota, S.D. CODIFIED LAWS § 15-6-13(a) (2007); Utah, UTAH R. CIV. P. 13(a); Vermont, VT. R. CIV. P. 13(a); Washington, WASH. SUPER. CT. CIV. R. 13(a); West Virginia, W. VA. R. CIV. P. 13(a); and Wyoming, WYO. R. CIV. P. 13(a).

59. These states are: Alabama, ALA. R. CIV. P. 13(a) (providing an exception for insured-conducted defense and containing a collateral estoppel and res judicata fall-back provision); California, CAL. CIV. PROC. CODE § 426.30 (West 2004) (limiting application to the time of serving the "answer to the complaint"); Delaware, DEL. CH. CT. R. 13(a) (departing from the exception in Federal Rule 13 for claims brought by attachment); DEL. CT. COM. PL. R. 13(a); Iowa, IOWA R. CIV. P. § 1.241 (containing an entirely different wording from the federal rule); Louisiana, LA. CODE. CIV. PROC. ANN. art. 1061 (2005) (referring to a "reconventional demand" rather than a counterclaim); Maine, ME. R. CIV. P. 13(a) (containing a motor vehicle damages claim exception); Massachusetts, MASS. R. CIV. P. 13(a) (containing exception for claims "based upon property damage arising out of a collision, personal injury, including actions for consequential damages, or death"); Michigan, MICH. CT. R. 2.203(a) (stating that counterclaims may be filed, but that if they are filed, all other transactionally related claims must also be filed); Minnesota, MINN. R. CIV. P. 13.01 (departing from the attachment exception in Federal Rule 13); Mississippi, MISS. R. CIV. P. 13(a) (providing an exception for insured-conducted defense and containing a collateral estoppel and res judicata fall-back provision); Missouri, MO. SUP. CT. R. 55.32(a) (containing a third exception for suit brought to obtain court approval of a settlement); New Jersey, N.J. CT. R. 4:7-1, 4:30A (stating that compulsory counterclaims are linked to the whole controversy doctrine); Rhode Island, R.I. SUPER. CT. R. CIV. P. 13(a) (containing an exception for claims relating to motor vehicles and reporter notes that explicitly state that the rule does not apply to default judgments because a pleading was not served); Tennessee, TENN. R. CIV. P. 13.01 (containing an exception for tort counterclaims); Texas, TEX. R. CIV. P. 97(a) (containing an exception for the "settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits"). New Hampshire has no written compulsory counterclaim rule, but instead the rule appears to be purely a function of the common law claim preclusion doctrine. *See* Osman v. Gagnon, 876 A.2d 193, 195 (N.H. 2005).

60. Wright, *supra* note 49, at 428.

61. *Id.* at 428 n.35.

seven of the original Advisory Committee Comments clearly states, "if the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred."[62]

Whether this preclusion is a matter of res judicata or based on principles of waiver and estoppel is not made clear by the rule.[63] "[M]ost of the courts, but not all, have spoken in terms of 'res judicata' preventing the later assertion of the claim."[64] This distinction, which has significance in the case of dismissals pursuant to Rule 12(b)(6), and perhaps to default judgments, will be discussed at greater length below.[65]

The advisory committee notes do not, however, indicate why the drafters chose to reject the principle of claimant autonomy that is embodied in the common law rules of res judicata and enshrined in the Restatement (Second) of Judgments, in favor of the efficiency-maximizing requirement that defendants file transactionally related counterclaims. One commentator noted, "Still, the rationale for Rule 13(a) is clear—when the same issues and facts are material to both party's [sic] claims, litigating the claims in a single lawsuit rather than separate lawsuits will economize on the cost of litigation because the same evidence does not have to be presented twice."[66] The Supreme Court has stated:

> [the] requirement that counterclaims arising out of the same transaction or occurrence as the opposing party's claim 'shall' be stated in the pleadings was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters. The Rule was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which the counterclaim became the basis of the complaint.[67]

The Third Circuit has elaborated on this explanation by observing that "the policy behind compelling the defendant to raise his compulsory counterclaim or have it barred from subsequent litigation is 'to enable the court to settle all

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62. Fed. R. Civ. P. 13 advisory committee's note 7 (citing as precedent interpretations of the previous Equity Rule 30 in *American Mills Co. v. American Surety Co.*, 260 U.S. 360 (1922) and *Marconi Wireless Telegraph Co. v. National Electric Signaling Co.*, 206 F. 295 (E.D.N.Y. 1913)).

63. *See* 6 WRIGHT & MILLER, *supra* note 4, § 1417, at 131–33.

64. *Id.* at 131. Wright and Miller argue, however, that a strict application of "res judicata to omitted counterclaims . . . [would] produce extremely harsh results." *Id.* at 135. In the case of a Rule 12(b)(6) dismissal, for example, courts would consider such a dismissal a valid, final, judgment on the merits. In order to avoid that harsh result, some courts began to rely on principles of waiver and estoppel, instead of res judicata, in applying Rule 13(a). *Id.* at 133. Under that approach, Rule 13(a) is a "bar created by rule . . . which logically is in the nature of an estoppel arising from the culpable conduct of a litigant in failing to assert a proper counterclaim." House v. Hanson, 72 N.W.2d 874, 877 (Minn. 1955) (citation omitted); *see* 6 WRIGHT & MILLER, *supra* note 4, § 1417, at 133.

65. *See also* Wright, *supra* note 49, at 429. See *infra* pp. 1133–34.

66. William M. Landes, *Counterclaims: An Economic Analysis*, 14 INT'L REV. L. & ECON. 235, 236 (1994).

67. S. Constr. Co. v. Pickard, 371 U.S. 57, 60 (1962) (per curiam).

related claims in one action, thereby avoiding a wasteful multiplicity of litigation on claims arising from a single transaction or occurrence.'"[68] Other federal courts have adopted similar descriptions of the policy behind the compulsory counterclaim rule,[69] although the Fifth Circuit added that one purpose of the compulsory counterclaim rule is "to provide complete relief to the defendant who has been brought involuntarily into the federal court."[70] None of these court decisions discusses the competing principle of the defendant's claim autonomy that underlies the contrary rule in the context of the common law of preclusion.

Importantly, however, none of these cases suggests that the compulsory counterclaim rule was created for the benefit of the plaintiff. The history of Rule 13(a) suggests that it was designed to streamline litigation for the benefit of the court system, not to create a right on behalf of the plaintiff to force the resolution of all claims that are transactionally related to the plaintiff's own claim. Thus, although the rule limits the defendant's claim autonomy in favor of judicial efficiency, it does not invest the plaintiff with a right to regard any resolution of its claim as also disposing of any of the defendant's transactionally related claims.

When Congress initially adopted Rule 13, the concept of a compulsory counterclaim was not universally well received. For example, one early commentator on the federal rules argued that it was wrong that "the mandatory provision, subject to court discretion, forces an individual to sacrifice his own judgment as to the desirability of pleading a certain claim and to accept the judgment of the trial court."[71] Professor Wright later responded that the rule is clearly intended to limit the defendant's claim autonomy and that such a limitation was perfectly appropriate given that "there is an important public interest in efficient conduct of the courts, and in adjudications on the merits rather than on the cleverness of counsel."[72]

Although this debate continued for a while in academic circles, with opponents[73] trading blows with supporters of the rule,[74] the litigating community

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68. Bristol Farmers Mkt. & Auction Co. v. Arlen Realty & Dev. Corp., 589 F.2d 1214, 1221 (3d Cir. 1978) (quoting 6 WRIGHT & MILLER, *supra* note 4, § 1409, at 37).

69. *See, e.g.*, U.S. Gen., Inc. v. City of Joliet, 598 F.2d 1050, 1054 (7th Cir. 1979) ("One of the virtues of the compulsory counterclaim provision is to prevent fragmentation of litigation and multiplicity of suits."); Montecatini Edison, S.P.A. v. Ziegler, 486 F.2d 1279, 1282 (D.C. Cir. 1973) (noting that the objective of the federal compulsory counterclaim rule is "to provide complete relief to the parties, to conserve judicial resources and to avoid the proliferation of lawsuits"); Local Union No. 11, Int'l Bd. of Elec. Workers v. G. P. Thompson Elec., Inc., 363 F.2d 181, 184 (9th Cir. 1966); Union Paving Co. v. Downer Corp., 276 F.2d 468, 470 (9th Cir. 1960).

70. Plant v. Blazer Fin. Servs., 598 F.2d 1357, 1364 (5th Cir. 1979) (citing Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 715 (5th Cir. 1970)).

71. Legislation, *Recent Trends in Joinder of Parties, Causes, and Counterclaims*, 37 COLUM. L. REV. 462, 463–64 n.8 (1937).

72. Wright, *supra* note 49, at 455.

73. Professor Millar, writing more than fifteen years after the adoption of the federal rules stated:

> Certainly a rule of compulsion extended to every allowable counterclaim cannot be regarded as defensible. If a compulsory counterclaim rule is ever justifiable it is only when the counterclaim operates by way of

> defense to the principal claim. Just as a defendant may not with impunity withhold a defense, so we might without violence to the traditional maxim deny him the right to withhold a counterclaim if this in whole or part is of a defensive nature. This would appear to indicate the proper line of division between compulsory and permissive counterclaims. But it is not the line of division adopted by the Federal Rules under which the distinction is between counter-demands which arise out of 'the transaction or occurrence' on which the plaintiff rests his claim and those which do not. Suppose on the one hand, the ordinary case of set-off: B, let us say, is indebted to A in the sum of $500 upon a promissory note, and A is indebted to B in the sum of $1,000 for goods sold and delivered. One would imagine that if we were to have a compulsory rule this would be the very case to which it would be appropriate, for recovery by B would here as part of its effect wholly cancel A's claim. Yet under such a rule as the federal one, B would be perfectly free to reserve his counter-demand for a separate action. Suppose, on the other hand, that A and B have engaged in the exchange of properties each giving to the other as part of the transaction, a mortgage on the property conveyed to the mortgagor, and that in each case the mortgage property is so ample a security for the mortgage indebtedness that no question of a deficiency will arise. Suppose, further, that after the maturity of both mortgages, each remained unpaid, A sues to foreclose the mortgage executed by B on property X, not asking for any personal judgment against B. Under the principle thus accepted by the Federal Rule, B would be compelled, through the medium of a counterclaim, to seek foreclosure of the mortgage executed by A on property Y, although he might have excellent reasons for not wanting to do so until a later time, and simply because both claims, affect entirely different pieces of property arose out of the same transaction. Clearly, then, there should be no compulsion where the two claims thus aim at unconnected relief.

ROBERT W. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 138–39 (1952) (footnote omitted).

74. Professor Wright, on the other hand, found Professor Millar's arguments to be utterly unpersuasive:

> Rarely has an argument marched so inexorably from false premise to unsound conclusion. This whole house of cards is stacked on the proposition that only those counterclaims should be compulsory which are defensive in whole or in part. Why? If counterclaims are to be compelled at all, it must be because some public purpose is served thereby. The compulsory counterclaim rule was not promulgated to save litigants from their own stupidity. A counterclaim may be of a defensive nature, and yet be completely unrelated to plaintiff's claim. In such a case it will probably be to defendant's advantage to plead it, and thus avoid the risk that plaintiff will get a judgment on his claim, squander the proceeds in riotous living, and go bankrupt before the defendant gets around to prosecuting his own claim. But if the claims are unrelated, there is no gain to the public in having them brought into an action, and no reason, therefore, for the public to take the extraordinary step of requiring the defendant to plead his claim in the first suit. The example given in the quoted passage of what the learned author calls "the very case" to which a compulsory rule is appropriate, demonstrates this. There is no economy in litigation in requiring *B* to assert his claim for

produced little active controversy. One of the reasons for the lack of concern for the defendant's rights may be the oft-discussed paucity of cases in which the court finds a party to be barred because of a failure to plead his claim as a counterclaim in a prior action.[75] Professor Wright noted as early as 1954 that:

> [by] far the great bulk of cases deciding whether a particular claim is compulsory are cases in which the claim has actually been pleaded, and the determination of whether it is compulsory is necessary only because of the consequences that decision may have on questions of jurisdiction, venue, jury trial, right to remove to another court, or appealability.[76]

Thus, as first year students of Civil Procedure are well aware, the only cases they are likely to read in their Civil Procedure casebooks concerning the scope of a compulsory counterclaim are subject matter jurisdiction cases in which the true issue is whether there is ancillary (or, now, supplemental) jurisdiction over the counterclaim.[77]

According to Professor Wright,

> [T]he reason [for the paucity of cases] is obvious: jurisdictions which make some counterclaims compulsory almost invariably provide that any other counterclaim, not compulsory, may be pleaded; thus the careful attorney can and will plead all his client's claims as counterclaims if there is any reason at all to think that they may be compulsory.[78]

There are, however, other explanations for the absence of such cases. First, there is an obvious tactical benefit to a defendant (at least one who wishes to challenge the plaintiff's claim) in adding an affirmative claim of his own against the plaintiff. Instead of fighting merely a defensive battle in the litigation, the defendant, by bringing a counterclaim back against the plaintiff, is able to go on the offensive in the litigation. This has obvious benefits when presenting the case

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> goods sold and delivered in the unrelated action by *A* on the promissory note. This can be regarded as an appropriate case for compulsion only by reasoning from the faulty premise that those claims which are defensive should be compelled.

Wright, *supra* note 49, at 457–58.

75. *See, e.g.*, *id.* at 432.

76. *Id.* at 433 (footnotes omitted).

77. *See, e.g.*, JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 602–08 (8th ed. 2001) (discussing in this section *United States v. Heyward-Robinson Co.*, 430 F.2d 1077 (2d Cir. 1970) and *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631 (3d Cir. 1961)). Both of these cases are, in fact, ancillary jurisdiction cases in which the question is whether the defendant's counterclaim is within the subject matter jurisdiction of the federal court. Other Civil Procedure casebooks follow a similar pattern. *See, e.g.*, JOEL W. FRIEDMAN ET AL., THE LAW OF CIVIL PROCEDURE: CASES AND MATERIALS 562–63 (2d ed. 2006) (using as the case on the scope of Rule 13(a) *Iglesias v. Mutual Life Insurance Co. of N.Y.*, 156 F.3d 237 (1st Cir. 1998), in which the issue of whether defendant's counterclaim is compulsory is relevant solely for the purpose of determining whether the court has supplemental jurisdiction over that claim).

78. Wright, *supra* note 49, at 432–33.

to the jury, as well as making the case amenable to settlement on terms more favorable to the defendant.[79] As the authors of one practice guide have noted, "filing a counterclaim puts the plaintiff on the defensive. The plaintiff has something to lose in pursuing the litigation and may thus be more amenable to settlement."[80] As a result, not many defendants complain about the "requirement" to file a compulsory counterclaim; most are delighted to bring their own affirmative claims against the plaintiff.

An alternative explanation for the same conclusion is suggested by Professor William Landes in a study of the incentives defendants have in filing counterclaims.[81] Using economic and game theory analysis, Landes concluded that the requirements of Rule 13(a) accomplish little because they simply duplicate the economic incentive that a defendant would have to file a transactionally related counterclaim.[82] The reason for this, as explained by Landes, is that:

> 1. If B's claim has a positive expected value as a counterclaim but a negative expected value as a stand-alone suit, B will not file a separate suit even if permitted. Thus, whether one classifies B's counterclaim as compulsory or permissive does not affect A's incentive to sue nor the choice between settling and going to trial.[83]

On the other hand, Landes explains:

> 2. If B's claim has a positive expected value both as a counterclaim and stand-alone suit, B will sue whether or not A does. Then, the category one places B's claim [in] may matter. Consider two possibilities.
>
> (a) If the cost savings from B's counterclaim exceed any possible advantages to B of a separate suit, B will file a counterclaim. B's counterclaim, however, will increase (not decrease) A's incentive to sue provided it lowers A's litigation cost . . . . As before, a counterclaim continues to increase the likelihood that the parties will go to trial.
>
> (b) Alternatively, let the advantages to B of filing a separate suit more than offset his cost savings from a counterclaim. . . . [A]lternatively, classifying B's claim as compulsory eliminates separate suits but increases the likelihood

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79. *See, e.g.*, DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 315 (4th ed. 2001) ("A plaintiff encountering a counterclaim must take it into account in settlement negotiations even if it is of marginal validity, because the discovery and other procedures necessary to defeat it will entail significant cost—and because there is always the chance that the trier of fact may give more credit to its validity than the plaintiff does.").

80. MAURA CORRIGAN ET AL., MICHIGAN PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 5:544.

81. Landes, *supra* note 66, at 235.

82. *Id.* at 236.

83. *Id.* at 244.

> that A will sue compared to the permissive case by lowering A's litigation costs.[84]

The bottom line is that, because a transactionally related counterclaim is likely to involve overlapping evidence that relates both to the plaintiff's and the defendant's claims, the cost savings that accrue from litigating both claims together make it unnecessary to compel a defendant to file the claim. On the other hand, if the potential counterclaim is unrelated the advantages of choosing one's own forum likely outweigh the cost savings of filing a counterclaim. Thus, Landes concludes, it "is unclear what purpose is served by a legal rule that merely duplicates what most parties would do in the absence of such a rule."[85]

The preceding tactical and economic considerations help to explain why there was little uproar when the federal rules went into effect and all transactionally related counterclaims became compulsory. For a number of tactical and economic reasons, most defendants who wish to contest the plaintiff's claim are likely to bring their own transactionally related claims regardless of the rule. None of these incentives applies, however, to the case of a defaulting defendant, whether strategic or unintentional. In either instance, there is real bite to the rule if courts interpret it to bar transactionally related claims in a default case.

Thus, in analyzing the issues raised by compulsory counterclaims in default cases, it is important to remember that the limitations on defendants' claim autonomy imposed by Rule 13(a) are more apparent than real, except in the case of default judgments. When defendants actively contest plaintiffs' claims, they have important natural incentives to bring transactionally related claims, and the rule's requirements are largely redundant. In the case of default judgments, however, the impact is real and significant. Strategic defaulters are deprived of the right to litigate their claims in courts of their own choosing, and unintentional defaulters are doubly penalized not only by the loss of the right to contest the plaintiff's claim, but also by the loss of their own affirmative claims.

II. ANALYZING THE ISSUE OF COMPULSORY COUNTERCLAIMS IN DEFAULT CASES: THE EFFECT OF A DEFAULT ON A DEFENDANT'S OBLIGATION TO FILE A COUNTERCLAIM

A. The Language and History of Rule 13(a)

When one looks at the language of Rule 13(a), it is not surprising that so many Civil Procedure professors assume that a transactionally related claim is not barred if the defendant never files an answer and defaults on the plaintiff's complaint.[86] By its very terms, the requirement that a party make a transactionally related counterclaim comes into effect only "at the time of serving the pleading." Therefore, if a defendant defaults and never files a pleading in response to the plaintiff's complaint, there is no obligation to file a transactionally related counterclaim. As a textual matter, the rule could not be much clearer on this point.

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84. *Id.*
85. *Id.*
86. *See* FED. R. CIV. P. 13(a).

Nothing in the language of Rule 13(a), in the remainder of Rule 13, or in the remainder of the Federal Rules of Civil Procedure suggests that a transactionally related counterclaim is barred if the defendant never files a pleading in response to the plaintiff's complaint.

The new "plain language" version of the Rules that went into effect on December 1, 2007, does not change the clear meaning of the provision. The newly revised provision reads:

> (1) In General. A pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim:
>
> (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and
>
> (B) does not require adding another party over whom the court cannot acquire jurisdiction.[87]

If anything, the revised provision makes it even clearer that the duty to file a transactionally related counterclaim arises only when a party files a responsive pleading.

Furthermore, nothing in the Advisory Committee Notes or the legislative history of Rule 13(a) runs contrary to the clearly expressed language. The original Advisory Committee Notes simply state that Rule 13(a) is "substantially [former] Equity Rule 30," and has been "broadened to include legal as well as equitable counterclaims."[88] The notes also state that if "the action proceeds to a judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred."[89] The note thus indicates the effect of failing to plead a counterclaim, which is not expressly stated in the rule, but it does not indicate anything further about the effect of failing to plead *anything* in response to the plaintiff's complaint. It refers to a circumstance in which an action proceeds to judgment without the interposition of a counterclaim *as required by subdivision (a)*, which begs and does not answer the question whether subdivision (a) requires a transactionally related counterclaim if the defendant fails to file an answer.

In 1946, Rule 13(a) was amended in several significant ways. First the drafters substituted the word "serving" for the word "filing." This change underscored the rulemakers' intent to apply the compulsory counterclaim requirement only when the defendant prepares and serves the answer on the plaintiff.[90] Additionally, the drafters deleted the phrase "not the subject of a pending action" from the first sentence of Rule 13(a) and added a clause at the end of 13(a) that stated, "except that such a claim need not be so stated if at the time the action commenced the claim was the subject of another pending action."[91] The

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

88. *Id.* advisory committee's note 1.

89. *Id.* advisory committee's note 7.

90. The Advisory Committee Notes indicate that "[t]he use of the word 'filing' was inadvertent. The word 'serving' conforms with subdivision (e) and with usage generally throughout the rules." *Id.* advisory committee's note to 1946 amendment.

91. FED. R. CIV. P. 13(a) (1946) (amended 1963).

Advisory Committee Notes state that this amendment insured against the "undesirable possibility" that a party could avoid the compulsory counterclaim rule by "bringing an independent action in another court after the commencement of the federal action but before serving his pleading in the federal action."[92] This comment reinforces the idea that the obligation to file a compulsory counterclaim does not arise until a defendant serves his pleading in a federal action.

In 1963, Rule 13(a) was amended by adding the final proviso of the current rule, which states that a pleader need not state a transactionally related claim if "the opposing party brought suit upon the 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." The Advisory Committee Notes state that:

> [w]hen a defendant, if he desires to defend his interest in property, is obliged to come in and litigate in a court to whose jurisdiction he could not ordinarily be subjected, fairness suggests that he should not be required to assert counterclaims, but should rather be permitted to do so at his election.[93]

This amendment clearly reflects a concern over the defendant's claim autonomy that bears upon the question of the effect of a default judgment on the defendant's right to sue on its own claim. The Advisory Committee Note makes it clear that the defendant's freedom to file its claim wherever it wishes should not be compromised in a case where jurisdiction is founded on the court's power over the defendant's property.[94] Even though it would clearly be more efficient for a court to adjudicate a transactionally related counterclaim in a case where jurisdiction rested on seizure of the defendant's property, the Advisory Committee thought it unfair to put the defendant in a position in which it was forced to choose to either defend the value of the property seized or waive the opportunity to bring its transactionally related counterclaim in another court.[95] If the defendant's claim autonomy should be respected in the case of attachment jurisdiction, then *a fortiori* the defendant's freedom to bring its claim in the court of its choosing should be honored if the defendant is willing to abandon its right to contest the plaintiff's claim altogether and forego the right to appear in the original forum.

Moreover, it would not serve the policies underlying the compulsory counterclaim rule to bar transactionally related counterclaims in default cases. As noted above,[96] the drafters of the federal rules favored judicial economy over claim autonomy and required defendants to plead transactionally related counterclaims in order to insure that the federal courts did not twice have to deal with claims arising from the same transaction or occurrence. This makes some sense when the defendant files an answer and litigates the plaintiff's original claim. It makes little sense, however, in the context of a default case where the defendant never litigates the plaintiff's claim. In default cases the original court invests little time and effort

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92. *Id.* advisory committee's note to 1946 amendment.
93. *Id.* advisory committee's note to 1963 amendment.
94. *See id.*
95. *See supra* note 93.
96. *See supra* p. 1123.

in entering a default judgment, so it does not risk duplication of effort to allow the defaulting defendant to bring its own transactionally related claim later in a different court. If the plaintiff seeks a sum certain, the rules authorize the clerk to enter a judgment, and, as a result, these default cases will never even come before a federal judge.[97] In all other cases the plaintiff applies to the court for a default judgment, and the court is authorized, but not required, to hold a hearing in order to determine the amount of damages.[98] Thus, because the court invests so little time in entering a default judgment, it would not create a costly duplication of effort to permit the defendant to file a transactionally related claim at a later date.

Furthermore, the application of the compulsory counterclaim rule to default cases greatly harms the unintentional defaulter. Application of the rule to default cases makes the default doubly costly to the defendant because it loses not only the right to litigate the plaintiff's claim but also the right to litigate its affirmative claim against the plaintiff. This seems an exceptionally harsh result given the limited effort involved in entering a default judgment.

Additionally, application of the compulsory counterclaim rule in default cases deprives the defendant of an important tactical choice. If the plaintiff's claim involves a relatively small amount or, for tactical reasons, the defendant has no interest in contesting it, the plaintiff may wish to forego the opportunity to defend against the plaintiff's claim in order to obtain the benefit of its own choice of forum. Indeed, a potential defendant may file a trivial claim in his forum of choice precisely in order to deprive the other party of his preferred forum. In such a case, the defendant should have the option of foregoing the right to litigate the plaintiff's claim (and thus costing little in the way of judicial resources) and retain the right to litigate his own affirmative claim elsewhere.

Depriving the defendant of this important tactical choice is as harsh as imposing a double penalty on the defendant if it intentionally defaults. In either case, the defendant is seriously prejudiced without any justification from the perspective of judicial economy. There is little reason to penalize the defendant so severely given the purpose of Rule 13(a) and the importance of preserving some semblance of claim autonomy.[99]

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97. *See* FED. R. CIV. P. 55(b)(1) (1987) (amended 2007) ("If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk--on the plaintiff's request, with an affidavit showing the amount due--must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.").

98. *See id.* at 55(b)(2) ("In all other cases, the party must apply to the court for a default judgment. . . . If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 3 days before the hearing. The court may conduct hearings or make referrals--preserving any federal statutory right to a jury trial--when, to enter or effectuate judgment, it needs to: (A) conduct an accounting; (B) determine the amount of damages; (C) establish the truth of any allegation by evidence; or (D) investigate any other matter.").

99. *See* Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 955 n.39 (1998) ("[I]f the defendant's affirmative claim is weighty, it may be wasted as a counterclaim. By asserting the claim as counterclaim rather than as a separate lawsuit, a

B. The Caselaw and Commentary on Compulsory Counterclaims in Default Cases

Although there are not many reported cases on this issue in the federal courts, those cases that do address this question uniformly conclude that a defaulting defendant forfeits not only the right to contest the plaintiff's claim, but also the right to file its own transactionally related claim in a later lawsuit. How the courts arrived at this conclusion, which is so apparently inconsistent with the plain meaning of Rule 13(a), is an interesting story that involves loose citing of inapplicable precedent and a good deal of sloppy reasoning.

The first federal court to address this issue was the Tenth Circuit in *Brown v. McCormick*.[100] Brown initially filed suit against the McCormicks for an alleged breach of contract. The McCormicks' attorney filed an out-of-time appearance and was granted a 30-day extension to respond.[101] After the McCormicks failed to file an answer within the time granted by the extension order, Brown filed a request for a default judgment. The McCormicks' attorney then requested leave to withdraw from the case, and the court granted it. A second attorney entered his appearance and received an additional extension of time to respond.[102] This attorney then answered by filing a general denial. After scheduled depositions were cancelled due to attorney conflict, rescheduled, and eventually never taken because of the McCormicks' failure to appear, the McCormicks' second attorney withdrew from the case.[103] The district judge then ordered the McCormicks' pleadings stricken pursuant to Rule 37 of the Federal Rules of Civil Procedure and entered a default judgment against the McCormicks.[104]

Three years later the McCormicks filed an action in Arizona state court raising the same issues that had been the subject of the original federal court lawsuit. After Brown unsuccessfully moved to dismiss that case on res judicata grounds, Brown filed suit in the U.S. District Court for the District of Kansas to seek an anti-suit injunction against the McCormicks from proceeding with the action in Arizona state court. The district court granted the injunction, and the court of appeals affirmed.[105]

The court ruled that two of the counts were attempts to relitigate issues already determined by the default judgment and that the remaining count should be barred because it was a compulsory counterclaim in the first lawsuit.[106] The court did not address whether Rule 13(a) applies in the case of default judgments, and it is not surprising that it failed to do so. In this case, the default judgment was *not* entered because of the defendant's failure to file an answer. Instead, the defendant

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defendant forfeits the choice of forum and timing. A defendant also may be concerned that a judge or jury will perceive the assertion as 'merely a counterclaim' and will view it more as a tactical maneuver than as a legitimate claim.").

100. 608 F.2d 410, 416 (10th Cir. 1979).
101. *Id.* at 412.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 416.
106. *Id.*

in *Brown* filed an answer, at which time it was required to file a transactionally related counterclaim or lose the right to bring it. The court entered a default judgment as a sanction under Rule 37 only after the defendant failed to proceed with the discovery process.[107]

Surprisingly, subsequent cases ignored the procedural context of *Brown* and cited *Brown* for the proposition that a defendant who is defaulted pursuant to Rule 55 for failing to file an answer is barred from bringing a later lawsuit on a transactionally related claim. For example, in *Law Offices of Jerris Leonard, P.C. v. Mideast Systems, Ltd.*,[108] a Washington, D.C. district court ruled that "[d]efendants who have a valid default judgment entered against them may be barred from raising compulsory counterclaims in subsequent state court litigation."[109] In response to the argument that this result is inconsistent with the clear language of Rule 13(a), the court stated that "[i]f this is another way of arguing that Rule 13(a) is inapplicable where a party has a default judgment entered against it, *Brown* holds otherwise."[110] The court simply ignored the fact that in *Brown* the defendant had filed an answer and was placed in default, not for failure to file an answer, but rather for the failure to proceed with discovery. The court responded to the argument that Rule 13(a) is, by its terms, not applicable to a party who elects not to appear in an action by responding, "This is simply not the law. The fact that a party declines to appear does not prevent the default judgment from being set up as res judicata against it, barring subsequent counterclaims."[111] Thus, without any real analysis of the issues presented by the application of the compulsory counterclaim rule in default cases, the court simply relied on the result in *Brown* without considering whether it was truly analogous to the case at hand.

Other cases conclude that a default judgment strips the defendant of the right to file a subsequent transactionally related claim without even the minimal analysis of the previous case. For example, in *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*,[112] the Second Circuit concluded that "[b]y failing to assert it in a timely responsive pleading, [the defendant] is now foreclosed from raising it in any subsequent proceeding—including the post-default damages inquest presently under review."[113]

Other courts reached similar conclusions with a similarly shallow analysis. In *James E. McFadden, Inc. v. Bechtel Power Corp.*,[114] the district court concluded that a compulsory counterclaim is barred after a judgment by default because "[t]o hold otherwise would be to allow the plaintiff in this action to

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107. *Id.* at 412.
108. 111 F.R.D. 359 (D.D.C. 1986).
109. *Id.* at 361.
110. *Id.* at 362.
111. *Id.*
112. 973 F.2d 155 (2d Cir. 1992).
113. *Id.* at 160.
114. No. 85-6945, 1986 WL 4195, at *1 (E.D. Pa. Apr. 3, 1986).

relitigate matters that the defendant [the plaintiff in the first case] was entitled to believe were finally decided by the previous litigation it initiated."[115]

The court did not, however, explain why the plaintiff in the first case was entitled to rely on a default judgment as resolving not only the plaintiff's own claim but also any transactionally related counterclaim that a defendant might wish to file in a later action.

The only federal case to give any serious analysis to the effect of a default judgment on a defendant's obligation to file a compulsory counterclaim is *Carteret Savings & Loan Ass'n, F.A. v. Jackson*.[116] In *Carteret*, the defendant had purchased a yacht in Florida with the expectation that it would be taken to the Virgin Islands, where it would be chartered. The defendant planned that the charter fees would cover all expenses and the transaction would provide it with a substantial tax write-off. The yacht purchase was financed by the defendant's note to the plaintiff savings and loan association. The defendants alleged that the note was without recourse; that is, the only way for the savings and loan to recover if the defendants defaulted was to seize the yacht and sell it to recover the proceeds. Unfortunately for the defendants, nothing on the face of the note indicated that it was without recourse to sue the defendants for any deficiencies left after the sale of the yacht.

After the defendants defaulted on their note, the savings and loan sued the Massachusetts residents in federal district court in Florida.[117] The defendants defaulted in this first suit, and the savings and loan had the yacht seized and sold by the U.S. Marshall in partial satisfaction of the judgment. The savings and loan then instituted a second lawsuit in federal district court in Massachusetts in order to recover on the balance of the note. In response, the defendants filed an answer and counterclaimed against the savings and loan for negligence, fraud, abusive process, and unfair and deceptive business practices. The trial court granted summary judgment for the plaintiff savings and loan, and the defendants appealed to the First Circuit.[118]

The issue on appeal was whether the defendant's counterclaims were barred by the compulsory counterclaim rule contained in Federal Rule 13(a). The defendants argued that because they had never filed a pleading, the rule did not apply because the obligation to file a counterclaim only arises when a party files a responsive pleading.[119] A unanimous panel of the First Circuit rejected the defendant's argument that they should be allowed to file a claim after defaulting in the first case:

> We could agree that if a pleading had never been required, as, for example, if "the time of serving" had never been reached, the

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115. *Id.* at *5; *see also* Cleckner v. Republic Van & Storage Co., 556 F.2d 766, 769 n.3 (5th Cir. 1977) ("This penalty has been applied for failure to assert a compulsory counterclaim where the first action has resulted in a consent or default judgment not tried upon its merits, but the action must necessarily have proceeded to a judgment.").

116. 812 F.2d 36, 38–39 (1st Cir. 1987).

117. *Id.* at 37.

118. *Id.*

119. *Id.* at 38.

> rule would not apply. We hold, however, that when a defendant is defaulted for failure to file a pleading, the default applies to whatever the party should have pleaded.[120]

The court noted that the purpose of Rule 13(a) was to preclude a multiplicity of lawsuits, in part to provide judicial economy. Although the court agreed with the defendant's argument that the entry of a default judgment requires very little in the way of judicial effort, it noted that:

> [T]here is a purpose in the rule quite apart from concern for the courts—the interest of the plaintiff in obtaining a complete and final resolution of the essential matters of the litigation. If we accepted defendants' position, a default judgment would be of uncertain value, and represent simply one step toward resolving the dispute between the parties. Instead of having a truly final judgment, the judgment creditor would remain faced with a prospect of litigating other aspects of the same transaction or occurrence at some later time, and in a forum of the defendant's choosing.[121]

The court deemed the defendants' proposed construction of Rule 13(a) "a mere wooden interpretation of the rule."[122] In order to advance the general principles of the federal rules to secure a speedy and inexpensive determination of every action, the court concluded that all of the defendants' counterclaims in the second action should have been presented as compulsory counterclaims in the Florida lawsuit and, therefore, that they were barred in the second Massachusetts lawsuit.[123]

Furthermore, the court was completely unsympathetic to the notion that the defendants should have some freedom to file their claims in the forum of their choice. In fact, the court viewed that suggestion as a reason to bar the defendant's claims:

> Indeed, it is evident from the record and their counsel's assertions at oral argument that defendants defaulted not because there was no evidentiary basis for defenses or counterclaims, but because of a belief that it would be possible to bring these matters before a different court. We agree with the district court that, having made this choice, defendants must live with the consequences.[124]

A number of state courts have reached the same conclusion as the above-cited federal cases. For example, in *Estate of Goston v. Ford Motor Co.*,[125] the court barred the plaintiff's claim on the ground that it should have been filed as a compulsory counterclaim in a previous case that had concluded in a default judgment after the defendant failed to plead in a timely fashion.[126] The court addressed neither the language of the rule (which is identical to the federal rules)

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120. *Id.* (citation omitted).
121. *Id.*
122. *Id.*
123. *Id.* at 38–39.
124. *Id.* at 39.
125. 898 S.W.2d 471 (Ark. 1995).
126. *Id.* at 474.

nor the policy reasons for allowing a defaulted party to plead what otherwise would have been a compulsory counterclaim in a subsequent case. Rather, the court cited to a discussion in Wright & Miller's treatise discussed below[127] and concluded that the plaintiff was barred from filing his claim.[128]

Other state cases reach a similar result,[129] but in not one of these cases does the court address either the statutory construction argument (that no obligation to file a counterclaim arises if the plaintiff has not filed a pleading) nor the policy argument that a defaulting defendant should have the freedom to file a transactionally related claim where it chooses as long as the court in case one has not been burdened beyond the filing of a default judgment. For example, in *Technical Air Products, Inc. v. Sheridan-Gray, Inc*., the court simply states that a "default judgment has the same res judicata effect as a judgment on the merits where the issues were litigated," and that finding otherwise "would circumvent the purpose of Rule 13(a) if we were to rule that a claim which was the subject of a compulsory counterclaim is not barred in a subsequent suit merely because judgment was taken by default rather than on the merits."[130] Such a rule "would allow a litigant to default and then bring a separate action on a claim that would have been compulsory in the first action had he filed an answer."[131]

Similarly, in *Letourneau v. Hickey*,[132] the court stated:

> Irrespective of whether the doctrinal underpinning of the compulsory counterclaim rule is res judicata or waiver and estoppel, "courts have given default judgments full effect and have held that a

127. *See* 6 WRIGHT & MILLER, *supra* note 4, § 1417, at 134.

128. *Goston*, 898 S.W.2d at 474.

129. In each of these cases, the court applied a compulsory counterclaim rule identical to the federal provision to bar a transactionally related claim filed after a default judgment. *See, e.g.*, Matrix Group, Inc. v. Ford Motor Credit Co., No. 04-CV-1552, 2004 WL 2742835, at *3 (E.D. Pa. Nov. 29, 2004) (applying Delaware compulsory counterclaim provision that is identical to Federal Rule 13(a)); Tech. Air Prods., Inc. v. Sheridan-Gray, Inc., 445 P.2d 426, 428 (Ariz. 1968); Fireman's Ins. Co. of Newark v. L. P. Steuart & Bros., 158 A.2d 675, 677 (D.C. 1960); Comer v. Fistere, 103 A.2d 206, 208 (D.C. 1954); Rudner v. Cabrera, 455 So. 2d 1093, 1096 (Fla. Dist. Ct. App. 1984); Cianciolo v. Lauer, 819 S.W.2d 726, 727 (Ky. Ct. App. 1991); Keller v. Keklikian, 244 S.W.2d 1001, 1005 (Mo. 1952); Joel Bianco Kawsaki Plus v. Meramec Valley Bank, No. ED 77624, 2001 WL 1001099, at *4 (Mo. Ct. App. Sept. 4, 2001); MacDonald v. Krause, 362 P.2d 724, 729 (Nev. 1961); Wagner's Country Corner, Inc. v. Fischer, No. 47879, 1984 WL 5242, at *2 (Ohio App. Oct. 11, 1984) (citing 6 WRIGHT & MILLER, *supra* note 4, § 1416); Broadway Mgmt., Inc.v. Godale, 378 N.E.2d 1072, 1073 (Ohio Ct. App. 1977); Haberer v. First Bank of S.D., 429 N.W.2d 62, 68 (S.D. 1988); Harris v. Jones, 404 S.W.2d 349, 352 (Tex. Civ. App. 1966); Letourneau v. Hickey, 807 A.2d 437, 439–40 (Vt. 2002) (barring a claim absent the filing of a pleading even where the reporter notes to the state rule indicated that the filing of a pleading was required for the compulsory counterclaim rule to have any effect).

130. *Tech. Air Prods.*, 445 P.2d at 428.

131. *Id.*

132. 807 A.2d 437.

> [compulsory] counterclaim omitted from an action that terminates in a default judgment will be barred from any subsequent suits."[133]

For their part, the treatise writers have not done more than report the apparent unanimity of the case law on this issue. As noted above, Wright & Miller even give different answers to the question in different parts of their multi-volume treatise. In the section on Rule 13(a), the authors note that "[c]onsent and default judgments present a special problem with regard to the effect of failing to plead a Rule 13(a) counterclaim."[134] They conclude that the answer to these questions may depend upon whether an omitted counterclaim should be treated as a matter of claim preclusion, in which case it would be barred in any subsequent action, or treated as a matter of estoppel or waiver, in which case the claim might be allowed.[135] The authors state that this question is not resolved by the Advisory Committee Notes, which simply say that an independent suit is barred if the first suit has proceeded to judgment without specifying precisely what kind of judgment is envisioned. The authors conclude by stating simply that "[t]ypically, courts have given default judgments full effect and have held that a counterclaim omitted from an action that terminates in a default judgment will be barred from any subsequent suits."[136] The only cases they cite, however, are the *Carteret* case, discussed above, along with two state cases.[137]

In the section on defaults under Rule 55, however, Wright & Miller reach the contrary conclusion:

> The policies favoring trial on the merits and limiting the effects of a default judgment also indicate that a defendant who fails to appear or to file a responsive pleading and against whom a judgment is entered under Rule 55(b) should not be prevented from asserting a claim in a later action that would have been a compulsory counterclaim in the action that terminated by default judgment. The compulsory counterclaim rule itself, Rule 13(a), suggests that this conclusion is sound by stating that defendant's "pleading shall state" any counterclaim defendant may have at that time. Accordingly, if the default judgment precedes defendant's filing of a responsive pleading—even if it occurs following an unsuccessful motion to dismiss—the defaulting defendant may assert the claim in a later action. Conversely, if the default judgment follows the filing of a responsive pleading, an unasserted compulsory counterclaim may not be advanced in a subsequent lawsuit.[138]

This explanation makes sense of the plain language of Rule 13(a), but the authors never explain why they do not include it in their section on that rule.

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133. *Id.* at 440 (quoting 6 WRIGHT & MILLER § 1417, at 134).

134. 6 WRIGHT & MILLER, *supra* note 4, § 1417, at 134.

135. *Id.*

136. *Id.* (citation omitted).

137. *Id.* at 134 n.13. The two state cases are *Fireman's Insurance Co. of Newark v. L. P. Steuart & Brothers*, 158 A.2d 675 (D.C. 1960) and *MacDonald v. Krause*, 362 P.2d 724 (Nev. 1961). *See* sources cited *supra* note 129.

138. 10A WRIGHT & MILLER, *supra* note 4, § 2681, at 12.

The other major treatise, *Moore's Federal Practice*, is similarly brief in its analysis of the issue in the section on Rule 13(a):

> A default judgment in an earlier action against a party attempting to raise a claim which was compulsory in that earlier action serves as a final judgment barring the assertion of the claim in any subsequent proceeding. Courts have also barred a counterclaim in the post-default hearing on damages by a defaulting defendant who had failed to file a responsive pleading containing its counterclaim.[139]

The treatises thus merely echo the rulings of the federal courts without questioning the logic or wisdom of the decisions, which is the subject of further exploration in the next section.

C. Critiquing the Caselaw on Compulsory Counterclaims in Default Cases

1. The Current Caselaw on Compulsory Counterclaims in Default Cases Is Inconsistent with the Language and Policy of Rule 13(a)

The reasoning underlying the conclusions in these cases and scholarly works is remarkably thin. First, courts and scholars do not directly address the fact that the text of Rule 13(a) clearly requires a transactionally related counterclaim only when the defendant files an answer. The *Carteret* court condemns this reading of the text as "wooden," and reads the text as if it said, "a pleading shall state as a counterclaim any claim, which at the time the party *should have served* the pleading . . . ."[140] This interpretation clearly takes liberties with the plain language of the rule, and it could only be justified by compelling reasons flowing from the policy underlying the rule.

Second, the policies underlying the rule do not remotely support the conclusion reached by the courts. The First Circuit, for example, cites the obvious policy of encouraging judicial economy, even as it acknowledges the minimal investment of time and judicial resources involved in rendering a default judgment.[141] In fact, the rendering of a default judgment involves far less time and effort than disposing of a case on a Rule 12(b)(6) motion. However, in the latter case, the great majority of federal courts have held that a defendant is not required to file a transactionally related counterclaim, and, if the case is dismissed, is free to file its affirmative claim elsewhere.[142] Indeed, in these cases, the courts typically rely on the language of Rule 13(a) to conclude that the obligation to file a transactionally related counterclaim arises only when the defendant files an answer, not when the defendant files a Rule 12(b)(6) motion.[143]

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139. 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 13.14[3] (3d ed. 2007) (citing Dillard v. Sec. Pac. Brokers, Inc., 835 F.2d 607, 608 (5th Cir. 1988)).

140. *See* Carteret Sav. & Loan Ass'n, F.A. v. Jackson, 812 F.2d 36, 38 (1st Cir. 1987) ("[W]hen a defendant is defaulted for failure to file a pleading, the default applies to whatever the party should have pleaded.").

141. *Id.*

142. *See infra* pp. 1137–41.

143. *See infra* pp. 1137–38.

Third, and finally, the courts argue that allowing a defaulting defendant to file a transactionally related claim in a subsequent suit somehow deprives the plaintiff of some of the benefit of his default case victory. In *Carteret*, for example, the court argues that:

> [T]here is a purpose in the rule quite apart from concern for the courts—the interest of the plaintiff in obtaining a complete and final resolution of the essential matters of the litigation. If we accept the defendant's position, a default judgment would be of uncertain value, and represent simply one step toward resolving the dispute between the parties. Instead of having a truly final judgment, the judgment creditor would remain faced with a prospect of litigating other aspects of the same transaction or occurrence at some later time, and in a forum of the defendant's choosing.[144]

The *Carteret* court does not explain, however, why the plaintiff has a right to have every matter that is transactionally related to its lawsuit resolved by the default judgment. The idea that the plaintiff, just because it is the first to file, has limited the "right" to have the defendant's claim litigated in the plaintiff's choice of forum has no support in the history of Rule 13(a) nor in any comments by the Supreme Court on the subject. The only clear policy underlying the compulsory counterclaim rule is the desire to enhance judicial efficiency by consolidating transactionally related matters in one action. There is no indication that the plaintiff somehow has acquired additional rights to a final resolution of every claim that arises out of the matter. The plaintiff has a right to a final conclusion to its own claim by virtue of the default judgment. The defendant may not avoid the claim-preclusive effect of a valid default judgment, but that should not mean that, in addition to obtaining the conclusive judgment on its own claim, the plaintiff should obtain a conclusive judgment on the defendant's claim.

Indeed, the Restatement Second of Judgments' position on the defendant's right to bring its own claim in the forum of its choosing suggests that the defendant's claim autonomy should override any supposed right of the plaintiff to force the defendant to litigate in the plaintiff's forum. If the policy of judicial economy underlying Rule 13(a) is not at stake, then the defendant's right to its forum of choice should not be sacrificed.

2. The Caselaw on Compulsory Counterclaims in Default Cases Is Inconsistent with the Caselaw on Compulsory Counterclaims in Cases Dismissed Pursuant to Rules 12(b)(6) and 56.

Interestingly, most federal courts have recognized the importance of defendant's claim autonomy in concluding that a defendant does not waive a transactionally related claim if it fails to bring it in a case in which it makes a successful Rule 12 motion to dismiss.[145] These cases explicitly rely on the

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144. *Carteret*, 812 F.2d at 38.

145. As *Moore's Federal Practice* notes:

> A claim that should have been pleaded as a compulsory counterclaim in the first suit will only be barred in a subsequent action if a responsive pleading, such as an answer, was required to be or was

language of Rule 13(a) to support the conclusion that the defendant's obligation to file a transactionally related counterclaim does not arise until the defendant files its answer, and, like the issue of compulsory counterclaims in default cases, this issue did not appear in the federal case law until long after the adoption of the federal rules. In each case, a defendant never files an answer and, therefore, never falls within the literal language of Rule 13(a), which requires the filing of a transactionally related counterclaim only when a responsive pleading is filed. Moreover, because a court expends fewer judicial resources in a default judgment case than in a case in which the court files a consent judgment with findings of fact and conclusions of law, there is even less reason to foreclose a defendant from subsequently filing a case involving claims that are transactionally related to the claims at issue in the first case.

The leading case on this issue is *Lawhorn v. Atlantic Refining Co.*[146] In *Lawhorn*, the first case was brought by Lawhorn against Atlantic Refining for breach of a distributorship contract. Instead of answering the complaint, Atlantic filed a Rule 12(b)(6) motion to dismiss Lawhorn's complaint on the ground that it failed to state a claim upon which relief could be granted. The court granted this motion and dismissed Lawhorn's suit. Atlantic brought the second case against Lawhorn to recover for money owed on an open account. Because no one questioned that this claim was transactionally related to Lawhorn's claim in the first suit, Lawhorn moved to dismiss the claim on the ground that it should have been brought as a compulsory counterclaim in case one. The district court refused to grant this motion to dismiss, and the Fifth Circuit affirmed the district court's ruling.

The court began its analysis with a somewhat dubious proposition by arguing that:

> it is clear that a plaintiff must have a claim before a defendant is required to assert a compulsory counterclaim. A counterclaim must be pressed only when it is related to the subject matter of the opposing party's claim . . . . That is what makes it a counterclaim. And it is only to such a counterclaim that the rule attaches a compulsory character. When Atlantic's motion to dismiss was successful, it was a judicial determination that Lawhorn had no claim upon which relief could be granted. If there was no claim, no counterclaim was required.[147]

Thus, the court seemed to argue that there could be no obligation to file a transactionally related counterclaim if the plaintiff's complaint fails to state a claim for which relief may be granted. Yet, if Atlantic had filed an answer before it had filed its Rule 12(b)(6) motion, there would have been no doubt that the answer must have contained any transactionally related counterclaim or the claim would

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> served in the earlier action. Federal courts ruling on the issue have uniformly held that a motion to dismiss pursuant to Rule 12 is not a responsive pleading.

MOORE ET AL., *supra* note 139, § 13.15.

146. 299 F.2d 353 (5th Cir. 1962).

147. *Id.* at 356 (citation omitted).

have been lost, even if the court had subsequently ruled that the plaintiff's complaint failed to state a claim.

The court went on to state that the rules clearly permit the defendant to file a Rule 12(b)(6) motion first, and, if the defendant chooses to do so and prevails on its motion, there is never any requirement that it file an answer.[148] Even if the motion is unsuccessful, the defendant would have ten days in which to file its answer as required by the rule.[149] Thus, the court concluded:

> The failure of Atlantic to file its "counterclaim" at the time of its motion to dismiss did not then precipitate the coercive sanctions of Rule 13(a) since Rule 12(a) authorizes the postponement of all "responsive" pleadings. And once the motion to dismiss was sustained there was no suit or claim or demand to which any "responsive" pleading had to be filed.[150]

The court buttressed its conclusion that a successful Rule 12(b)(6) motion obviates the need to file any transactionally related counterclaim by emphasizing the importance of the defendant's claim autonomy. The court stated that the principles underlying Rule 13(a):

> must take into some account the equally valid and general proposition that a claimant should be able to choose his own forum. If one hauled into court as a defendant has a claim but the adversary plaintiff has not, the nominal defendant ought to be allowed to name the time and place to assert it. He should not be forced into court by a would-be plaintiff and forced to assert, or lose, a claim which he may choose not to litigate at all, or which he may choose to assert at another time and place. It is one thing to concentrate related litigation once it is properly precipitated. It is quite another thing for the Rules to compel the institution of litigation. The Rules should be construed in such a manner as to do substantial justice.[151]

In support of this conclusion, the court cited the Supreme Court's well-known statement that, in the context of a forum non conveniens motion, "unless the balance is in strong favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[152]

The conclusion reached by the Fifth Circuit in *Lawhorn* has been adopted in a number of other federal court cases. For example, in *Mellon Bank, N.A. v. Ternisky*,[153] the Fourth Circuit ruled that Mellon Bank was not precluded from bringing a claim that was transactionally related to a claim brought in an earlier suit by Ternisky against Mellon Bank, which had been dismissed upon Mellon Bank's Rule 12(b)(6) motion. The court concluded that, because Mellon Bank had filed a Rule 12(b)(6) motion and had never filed a responsive pleading in the case,

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148. *Id.* at 357.
149. *Id.*
150. *Id.*
151. *Id.* (footnote omitted).
152. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).
153. 999 F.2d 791 (4th Cir. 1993).

Mellon was never required to file a transactionally related counterclaim.[154] The court held that a transactionally related counterclaim must be filed only if the defendant files a responsive pleading, because holding "otherwise would inappropriately punish a litigant for interposing a successful motion to dismiss before answering by stripping it of the right to bring claims that, in hindsight, could or should have been brought had the motion to dismiss failed."[155] The court further stated that this result "would not serve the policy underlying [Rule 13(a)]: to conserve judicial resources and protect litigants from the expense of multiple lawsuits."[156]

In *Bluegrass Hosiery, Inc. v. Speizman Industries, Inc.*,[157] the Sixth Circuit applied this rationale in a case in which a Rule 12(b)(6) motion had been filed and denied, and the defendant had subsequently failed to file an answer within the required ten-day period. The defendant in the second suit claimed that because the deadline for filing an action in an earlier action between the parties had passed and the defendant had failed to file an answer, "Rule 13(a) should therefore apply regardless of the absence of a responsive pleading."[158] The court ruled against the defendant on the ground that the plaintiff in the earlier lawsuit had never moved for a default judgment after the defendant failed to file an answer within the required period and instead had settled the case before the filing of an answer. The failure to serve a pleading and assert a compulsory counterclaim did not waive the defendant's right to pursue a transactionally related claim in a subsequent action.[159] The court expressly noted that the defendant "was not required to assert its claims in the prior state court proceeding because no pleading, as the word is defined in [Federal Rule of Civil Procedure] 7(a), was ever filed."[160]

Other courts have adopted a similar approach in dismissing cases before the defendant was required to file an answer. In *A.S. Johnson Co. v. Atlantic Masonry Co.*,[161] the D.C. Court of Appeals extended the reasoning of the Rule 12(b)(6) cases to a case involving a motion to stay arbitration proceedings.[162] The court in *In re Integrated Resources Real Estate Ltd. Partnerships Securities Litigation*[163] applied this principle to reject a motion by the plaintiff to defer ruling on the defendant's Rule 12(b)(6) motion to dismiss until such time as the case

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154. *Id.* at 795 ("Rule 13(a) does not come into play when a defendant files only a motion to dismiss instead of a pleading.").

155. *Id.* (quoting Mut. Fire, Marine & Inland Ins. Co. v. Adler, 726 F. Supp. 478, 483 (S.D.N.Y. 1989)); *see also* Horn & Hardart Co. v. Nat'l Rail Passenger Corp., 843 F.2d 546, 549 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 849 (1988); United States v. Snider, 779 F.2d 1151, 1157 (6th Cir. 1985); Potter v. Carvel Stores of N.Y., Inc., 203 F. Supp. 462, 464–65 (D. Md. 1962), *aff'd*, 314 F.2d 45 (4th Cir. 1963) (per curiam).

156. *Mellon Bank*, 999 F.2d at 795 (quoting *Adler*, 726 F. Supp. at 483); *see also Horn & Hardardt Co.*, 843 F.2d at 549; *Snyder*, 779 F.2d at 1157; *Potter*, 203 F. Supp. at 464–65.

157. 214 F.3d 770 (6th Cir. 2000).

158. *Id.* at 772.

159. *Id.* at 773.

160. *Id.* at 772 (footnote omitted).

161. 693 A.2d 1117 (D.C. 1997).

162. *Id.* at 1119–20.

163. 851 F. Supp. 556 (S.D.N.Y. 1994).

reached the procedural posture for the defendant to assert a compulsory counterclaim. The court concluded that because a "motion to dismiss pursuant to Rule 12(b) [of the Federal Rules of Civil Procedure] is not a pleading as defined in Rule 7, there is no reason for a party to file a pleading while a motion to dismiss is pending."[164] Therefore, the defendant was not required to file any counterclaim while its motion to dismiss was pending.

The Seventh Circuit extended this theory in *Martino v. McDonald's System, Inc.*,[165] which concerned the effect of failing to plead a transactionally related counterclaim in a case that ended in a consent judgment to which the district court appended findings of fact and conclusions of law. The defendant in the subsequent suit argued that the plaintiff's claims should be barred because they should have been filed as a compulsory counterclaim in the first case. The court ruled that "Rule 13(a), however, by its own terms does not apply unless there has been some form of pleading."[166] Because the defendant in the first case filed no pleading "as the word is defined in Federal Rules of Civil Procedure 7(a)," Rule 13(a) did not require the defendant to file a transactionally related counterclaim.[167] The court went on to explain that this result was consistent with the policies and purpose of Rule 13(a) in terms that would seem to apply equally well to cases concluded in default judgments:

> Rule 13(a) is in some ways a harsh rule. It forces parties to raise certain claims at the time and place chosen by their opponents, or to lose them. The rule, however, is the result of a balancing between competing interests. The convenience of the party with a compulsory counterclaim is sacrificed in the interest of judicial economy. We do not believe that the drafters of Rule 13 chose the term "pleading" unadvisedly. It no doubt marks, although somewhat arbitrarily, a point at which the judicial burden of the earlier lawsuit outweighs the opposing party's interest in bringing an action when and where it is most convenient. The earlier action between these parties was terminated by a consent judgment before the answer was filed. We see little sense in applying the broad bar established in Rule 13(a) to an action that ended with virtually no burden on the judicial calendar.[168]

A default judgment case expends even fewer judicial resources than a case in which the court files a consent judgment with findings of fact and conclusions of law. As a result, there is even less reason to foreclose a defendant from subsequently filing a case involving claims that are transactionally related to the claims at issue in the first case. In each case, a defendant never files an answer and, therefore, never falls within the literal language of Rule 13(a), which requires the filing of a transactionally related counterclaim only when a responsive pleading is filed. Thus, there is little reason to distinguish between consent

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164. *Id.* at 570.
165. 598 F.2d 1079 (7th Cir. 1979).
166. *Id.* at 1082.
167. *Id.*
168. *Id.* (citation omitted).

judgment cases and default cases with respect to the obligation of defendants to file transactionally related counterclaims.

The illogic of this distinction is further underscored by the Sixth Circuit's decision in *United States v. Snider*,[169] a case that applies *Martino* to a proceeding that was telescoped by resort to Rule 65 of the Federal Rules of Civil Procedure. *Snider* involved a lawsuit in which the plaintiff doctor sued the federal government for an injunction to prevent the government from seizing payments on Medicare reimbursement claims. The district court set a hearing date on the plaintiff's request for a preliminary injunction and directed the government to file a response. The government's response included not only an opposition to the preliminary injunction but also motions to dismiss for lack of jurisdiction and for failure to state a claim upon which relief may be granted.[170] Following an initial hearing, the parties agreed to a court order pursuant to Federal Rule 65 that would advance the trial on the merits and consolidate it with the hearing on the application for a preliminary injunction. After this hearing, the district court ultimately entered summary judgment in favor of the government, which the Sixth Circuit affirmed on appeal.[171]

Subsequently, the government filed a separate suit in which it sought to recover payments made to the doctor. The doctor then filed a motion to dismiss on the grounds that the government's claims should have been filed as compulsory counterclaims in the first case. The court ruled that "Rule 13(a) serves a salutary purpose in cases that progress normally. However, the rule should not be applied in such a way as to make it difficult for a court to dispose of an application for a preliminary injunction by advancing a case on the merits under Rule 65."[172] The court went on to rule that, because of the clear language of Rule 13(a), it agreed with the district court's holding that Rule 13(a) only requires a compulsory counterclaim if the party who desires to assert a claim has served a pleading.[173] The court agreed with the Seventh Circuit's argument in *Martino* and concluded that while "Rule 13(a) serves the desirable goal of bringing all claims arising out of a transaction or occurrence in a single action," the compulsory counterclaim requirement of the Rule 13(a) is not applicable where "the rules do not require a pleading."[174]

The policy rationale of *Snider* is based on the conclusion that requiring a compulsory counterclaim in an action that can be speedily and efficiently resolved pursuant to Rule 65 would only serve to slow down the process by which the initial claim can be finally determined. Therefore, it makes no sense, and would not promote judicial economy, to require the addition of a counterclaim that would complicate and delay the resolution of the claim. The technical justification for permitting a defendant not to file the counterclaim is that under the procedures

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169. 779 F.2d 1151, 1157 (6th Cir. 1985); *see also* Franklin's Sys., Inc. v. Infanti, No. 94-C-3830, 1995 WL 505930 (N.D. Ill. Aug. 17, 1995).

170. *Snider*, 779 F.2d. at 1153–54.

171. *Id.*

172. *Id.* at 1156.

173. *Id.* at 1157.

174. *Id.*

authorized by Rule 65, the defendant never files an answer, and therefore the requirements of Rule 13(a) never come into play.

This argument applies all the more persuasively to default cases. The same technical argument applies because the defendant has never filed an answer and therefore never incurs the obligation of filing a transactionally related counterclaim. The policy rationale of *Snider* applies as well, because in a default case the court can resolve the pending action simply by entering a final judgment against the defendant, and this judgment is conclusive and has a claim preclusive effect. Denying the defendant the option of defaulting on the plaintiff's claim, and bringing its own claim elsewhere, simply delays the resolution of the first case and dramatically increases the judicial resources required to resolve the case. Allowing the defendant the choice of defaulting and bringing its own claim later would improve efficiency and would allow the plaintiff to enforce its judgment more quickly.

In response, one might argue that application of the compulsory counterclaim rule to default cases greatly lowers the investment of judicial resources in cases where the defendant unintentionally defaults. In that case, denying the right to bring a later case on a transactionally related claim eliminates the need for the courts ever to deal with the defendant's claim. But this result is far too harsh on the defaulting defendant because the unintentional defaulter loses not only the right to contest the plaintiff's claim, but also the right to bring its own claim. The system obviously values the right of every party to have its day in court, and the termination of such a right is not a result that should be favored by the courts.

Moreover, the unfairness to an unintentional defaulter is exacerbated by the extent to which the federal court system has expanded the definition of transactionally related claims. This has occurred principally because, as previously noted, the courts usually address the question of what constitutes a compulsory counterclaim in subject matter jurisdiction cases when deciding whether a counterclaim has ancillary or supplemental jurisdiction. In such cases, the court has a great incentive to broaden the definition of what is compulsory in order to grant subject matter jurisdiction over a counterclaim that lacks an independent basis of jurisdiction.[175]

Indeed, the Supreme Court's classic definition of the term "transaction" in *Moore v. New York Cotton Exchange*[176] arose in the context of deciding whether the defendant's counterclaim was compulsory under Equity Rule 30 in order to determine whether it would be subject to ancillary jurisdiction and therefore *allowed* (as opposed to required) to be litigated in the same case:

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175. *See, e.g.*, United States *ex rel.* D'Agostino Excavators, Inc. v. Heyward-Robinson Co., 430 F.2d 1077, 1081 (2d Cir. 1970); Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 633 (3d Cir. 1961); United Artists Corp. v. Masterpiece Prods., Inc., 221 F.2d 213, 216 (2d Cir. 1955). In *United Artists*, Chief Judge Clark, the principal author of the federal rules, stated, "In practice this criterion has been broadly interpreted to require not an absolute identity of factual backgrounds for the two claims, but only a logical relationship between them." 221 F.2d at 216.

176. 270 U.S. 593 (1926).

> "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. . . . Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations . . . does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are in all particulars, the same as those constituting the defendant's counterclaim.[177]

This context, which argues for an expansive reading of "same transaction or occurrence," is quite different from a situation in which the defendant seeks to bar the plaintiff from presenting a claim on the ground that it should have been a compulsory counterclaim in a prior action. In that case, the court might be inclined to define the scope of the counterclaim narrowly in order to avoid claim forfeiture. Because the cases defining the scope of what constitutes the same transactional occurrence as the plaintiff's claim tend to be quite liberal in defining what constitutes a compulsory counterclaim, the application of the compulsory counterclaim rule in default cases could lead to even more draconian results. Given this very broad definition of same transaction or occurrence, the chances of a defaulting defendant losing an unpleaded claim are considerably increased, and the resulting unfairness to the defendant of applying the compulsory counterclaim rule in default cases is greatly exacerbated.

D. The Larger Significance of the Courts' Application of the Compulsory Counterclaim Rule in Default Cases

The courts' application of the compulsory counterclaim rule in default cases raises a number of interesting questions. First, why have the courts applied the rule to default cases but not to other cases in which the defendant does not file a responsive pleading? Second, why has this issue arisen only in the last two or three decades, and why are there no reported cases on this issue during the first four decades of the operation of the Federal Rules of Civil Procedure? Finally, are the courts' rulings on this issue simply an isolated misinterpretation of a rule that applies in only a limited number of cases or are they part of some larger trend in the federal courts?

The answers to these questions appear to be intertwined. The relatively recent appearance of these cases coincides with a period of increasing judicial concern over clogged court dockets and overburdened federal judges. One can only speculate on why no cases raising this issue appeared until the 1970s, but the rhetoric of the cases suggests that the courts are anxious to rid themselves of claims if there is a handy way to do so under the rules.

This conclusion is supported by parallel developments in the caselaw concerning entries of default and default judgments. Although the substance of

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177. *Id.* at 610; *see also* Wright, *supra* note 49, at 438–42.

Rule 55 on defaults has not changed since the promulgation of the federal rules,[178] in recent cases, the courts have become noticeably more reluctant to grant relief from entries of default and default judgments. Even though such relief is available under the rules, the courts have exercised their discretion in a much harsher fashion in order to clear the dockets of cases.[179] For example, in *In re State Exchange Finance Co.*,[180] the Seventh Circuit noted the increasing trend toward a less forgiving judicial response to defaults:

> Traditionally, default judgments were strongly disfavored; however, "this court has moved away from the traditional position . . . ; we are increasingly reluctant to reverse refusals to set them aside." . . . The old formulas—a harsh sanction, drastic, should be imposed only as a last resort, for example when other, less drastic remedies prove unavailing, etc.—are still at times intoned. The new practice, however, is different. The entry of a default judgment is becoming . . . a common sanction for late filings by defendants, especially in collection suits such as this against sophisticated obligors. At a time of unprecedented caseloads, federal judges are unwilling to allow the processes of the federal courts to be used for purposes of delaying the payment of debts.[181]

In *North Central Illinois Laborers' District Council v. S.J. Groves & Sons Co.*,[182] the court elaborated upon this theme by concluding that district courts "have a responsibility to keep their court calendars as current as possible" by complying "with the rules of procedure and finality of judgment."[183] The court emphasized that "relief from a default judgment under rule 60(b) must be

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178. *See* 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 55 app. 100[3] (3d ed. 2007).

179. The Seventh Circuit has taken the same hard-line stance in cases involving dismissals for failure to prosecute as well as in traditional default cases. For example, in *Stevens v. Greyhound Lines, Inc.*, the court stated:

> While we recognize that dismissal is a harsh sanction only to be imposed in extreme circumstances and that the law favors giving plaintiffs their day in court, . . . we must bear in mind that if our heavily burdened court system is to operate in an efficient manner and protect the interests of all litigants, including those long awaiting a trial date, courts must have at their disposal the sanction of dismissal in order to ensure that litigants who are vigorously pursuing their cases are not hindered by those who are not.

710 F.2d 1224, 1230 (7th Cir. 1983).

180. 896 F.2d 1104, 1106 (7th Cir. 1990).

181. *Id.* at 1106 (citations omitted); *see also* United States v. DiMucci, 879 F.2d 1488, 1493–94 (7th Cir. 1989); N. Cent. Ill. Laborers' Dist. Council v. S.J. Groves & Sons Co., 842 F.2d 164, 167 (7th Cir. 1988); Hal Commodity Cycles Mgmt. Co. v. Kirsh, 825 F.2d 1136 (7th Cir. 1987).

182. 842 F.2d 164.

183. *Id.* at 167.

perceived as an exceptional remedy" if default judgment is to be "an effective deterrent against irresponsible conduct in litigation."[184]

The courts have been quite clear in linking the greater tolerance for default judgments to the increasing concern for clogged dockets and the workload of district judges. As the Seventh Circuit noted in one case, "[i]n view of expanding caseloads, however, we have in recent years become more tolerant of the use of default judgments . . . ."[185] Thus, the impact of what the Seventh Circuit has called "an environment of limited judicial resources"[186] has been to encourage the courts to ease docket pressure by ridding themselves of default cases.

The same incentive may underlie the cases that apply the compulsory counterclaim rule in default cases. By denying parties the right to litigate claims that are transactionally related to cases in which they defaulted, a court has an easy method of streamlining its own docket. But just as the courts should be wary of denying a litigant its day in court in a default case, the courts should be equally concerned about expanding the scope of a default judgment beyond the plaintiff's own claim and extending it to claims later brought by defendants. Defendants may have tactical, economic, or other reasons for wishing to litigate their claims in a forum different from the plaintiff's original choice, and courts should be sensitive to these concerns if they do not materially damage the goal of judicial economy.

There is, of course, no express link between the cases expanding the ability of district courts to impose a default judgment and the cases applying the compulsory counterclaim rule to default cases. But the cases share the common thread of using a defendant's default to remove cases from the trial court's docket, and they arise at basically the same time. After decades without a single reported case applying the compulsory counterclaim rule to a default case, the federal and state courts now seem bent on using the mechanism to thin their workload at the cost of claimant autonomy and the loss of potentially valid claims.

CONCLUSION

The federal rules reverse the normal preclusion rules that allow a defendant to plead a transactionally related claim in the forum of its own choice. The system's interest in the efficient resolution of transactionally related controversies trumps a defendant's claim autonomy, but it does not mean that defendants' rights should be sacrificed in a situation where the interests of judicial economy are not implicated. In the case of a defaulting defendant, the plain language of Rule 13(a) clearly seems to allow the defendant to make the choice of defaulting on the plaintiff's claim and raising its own claim elsewhere. In so doing, the rule also tempers the harshness of default on an unintentional defaulter by depriving the defendant of only the right to contest the plaintiff's claim and not the right to bring its own claim in a subsequent suit.

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184. *Id.* (citation omitted); *see also* Anilina Fabrique de Colorants v. Aakash Chems. & Dyestuffs, Inc., 856 F.2d 873, 883 (7th Cir. 1988) (Posner, J., dissenting).

185. Johnson v. Gudmundsson, 35 F.3d 1104, 1117 (7th Cir. 1994).

186. Swaim v. Moltan Co., 73 F.3d 711, 716 (7th Cir. 1996).

The cases that reach a contrary result ignore the language of Rule 13(a) in favor of a reading of the rule that favors docket control over fairness to litigants. These courts should follow the clear language of the rule and adhere to the balance struck by Rule 13(a) between judicial efficiency and claim autonomy. The rule was not meant to eliminate every last vestige of a defendant's claim autonomy regardless of the benefit to judicial efficiency. It was intended to reinforce the natural inclination of defendants to bring their own transactionally related claims when forced to defend against the plaintiff's complaint. Application of the rule to defaulting defendants fails to serve the purpose of the rule and needlessly penalizes defendants who unintentionally default as well as defendants who wish to pursue their own claims elsewhere.