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## Procedure -- Res Judicata -- Failure to Bring a Compulsory Counterclaim Against a Person Who Could Have Been Made a Party

Alexander C. Ross

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It appears that the federal courts are shifting from a policy of conformity of result between state and federal courts to a policy of promoting uniformity of procedure in the federal courts. Heretofore, the conformity of result between state and federal courts had been paramount, with the uniformity of federal procedure subordinated. Since *Blue Ridge* opened the door to exceptions, and since the principal case has placed an additional limitation upon the "outcome-determinative" standard, it is predicted that the "drastic logic"<sup>18</sup> which has been employed to achieve conformity of outcome will be curtailed further by future federal decisions in order to achieve "uniformity within the whole federal judicial trial system."<sup>19</sup>

JEFF D. GAUTIER

### PROCEDURE — RES JUDICATA — FAILURE TO BRING A COMPULSORY COUNTERCLAIM AGAINST A PERSON WHO COULD HAVE BEEN MADE A PARTY

A motorist's suit against both the driver and the owner (on a respondeat superior theory)<sup>1</sup> of another automobile for damages sustained in a collision was dismissed as to both defendants for the motorist's failure to assert a compulsory counterclaim<sup>2</sup> in a prior action on the same facts, in which the driver alone had sued the motorist for personal injuries. The prior action had resulted in a judicially approved settlement<sup>3</sup> in the driver's favor, negotiated by the motorist's insurer. On appeal, *held*, affirmed: the owner, although absent in the prior action, "could have been made a party." Thus, the motorist was barred from bringing this subsequent action against the owner. *Pesce v. Linaido*, 123 So.2d 747 (Fla. App. 1960).

The bar for failure to assert a compulsory counterclaim seldom has been applied by the courts. This has been due partially to the

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18. *Monarch Ins. Co. v. Spach*, 281 F.2d 401, 406 (5th Cir. 1960).

19. *Id.* at 408.

1. *Weber v. Porco*, 100 So.2d 146 (Fla. 1958) and cases cited therein are to the effect that an owner of an automobile is liable for the torts committed by anyone driving it with his express or implied permission. See also FLA. STAT. § 51.12 (1959).

2. FLA. R. CIV. P. 1.13 (1). *Compulsory Counterclaim*. "The defendant, at the time of the filing of his answer, shall state as a counterclaim, any claim, whether the subject of a pending action or not, which he has against the plaintiff, arising out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

3. FLA. STAT. § 45.02 (1959). A settlement in a minor's favor requires judicial approval.

harshness of the rule and partially because many of the situations in which it might be applied are disposed of by the bar of *res judicata*.<sup>4</sup> In addition, to avoid such penalty, attorneys have been extremely careful to assert any counterclaims.<sup>5</sup> All claims of the defendant which arise out of the transaction or occurrence that is the subject matter of the action must be asserted "against the plaintiff"<sup>6</sup> in the Florida courts. Previously, these courts have not expressly stated that the phrase "against the plaintiff" in Rule 1.13(1) can be extended to include anyone to whom the plaintiff's liability may be imputed, but they have said in dealing with a *permissive* counterclaim:

While . . . a counterclaim may seek relief against the original plaintiff solely, or against the plaintiff and other persons, regardless of whether the latter are or are not already parties to the suit, it is plain that 'in either event, in order to constitute a counterclaim, relief must be claimed against the original [plaintiff] or the matters set up must affect the original [plaintiff's] rights.'<sup>7</sup>

It should be noted that this was written in terms of the defendant's *right* to assert a counterclaim, and not his *duty* to do so.

The Federal Rules, after which the Florida Rules of Civil Procedure were fashioned,<sup>8</sup> require that a compulsory counterclaim be asserted against the "opposing party."<sup>9</sup> Few federal courts have considered a definition of the "opposing party" phrase, and those which have seem to have restricted it to mean the party or parties who originally brought suit.<sup>10</sup> Also, the federal courts have been quite strict in limiting compulsory counterclaims to those against the plaintiff in the same capacity in which he sued.<sup>11</sup> On the other hand, Florida has taken the position that so long as the plaintiff is *in court*, the defendant must assert a compulsory counterclaim even if the plaintiff were being sued in a different capacity.<sup>12</sup>

The court applied the compulsory counterclaim rule in the instant case despite the fact that the prior action had been settled. The court cited with approval a Missouri Supreme Court decision holding that a defendant was barred for failing to assert a compulsory counterclaim against the party who sued him, even though the defendant's insurer

4. Had the driver prevailed in the first action on the merits, on the basis of the motorist's negligence, the motorist now would be barred by *res judicata* from asserting a claim against the owner.

5. Wright, *Estoppel By Rule: The Compulsory Counterclaim Under Modern Pleading*, 38 MINN. L. REV. 423, 433 (1954). See also 1A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 394.1 (Rules ed. 1960).

6. See Rule 1.13(1) quoted note 2 *supra*.

7. Stark v. Marshall, 67 So.2d 235, 237 (Fla. 1953).

8. Pesce v. Linaido, 123 So.2d 747, 749 (Fla. App. 1960).

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

10. Reconstruction Fin. Corp. v. First Nat'l Bank, 17 F.R.D. 397, 404 (D. Wyo. 1955); United States *ex rel.* T.V.A. v. Lacy, 116 F. Supp. 15, 21 (N.D. Ala. 1953). See also 3 MOORE, FEDERAL PRACTICE § 13.06 (2d ed. 1948, Supp. 1960).

11. 3 MOORE, FEDERAL PRACTICE § 13.06 (2d ed. 1948, Supp. 1960) and cases cited.

12. Newton v. Mitchell, 42 So.2d 53 (Fla. 1949).

settled the prior action.<sup>13</sup> There was, however, no question of an absent third party as in the instant case.

Apparently, the court applied the following propositions in arriving at its conclusion in the present case: (1) a defendant who settles an action and fails to assert a compulsory counterclaim against the *one who sued him* is barred from asserting that claim in a subsequent action against the prior plaintiff; (2) a defendant who loses a suit on the merits to one whose liability may be imputed to a third person is barred by *res judicata* from bringing a subsequent action based on the same facts against that third person, and (3) a settlement in the two-party situation (one plaintiff and one defendant) is equivalent to a judgment on the merits for this purpose. Thus, a settlement in a three-party situation, such as the present case (owner, driver, and motorist), has the effect of a judgment on the merits, precluding the defendant from bringing a subsequent action against the person to whom the plaintiff's liability may be imputed. The court stated that the owner could not be held liable unless the driver were found negligent.<sup>14</sup> Thus, the failure to assert a compulsory counterclaim against the "agent" is effectually the equivalent of a failure to assert such a claim against the "principal,"<sup>15</sup> as though he had been a plaintiff in the first action.

The Florida courts previously have used the penalty of bar for failure to assert a compulsory counterclaim.<sup>16</sup> But the present case has extended this penalty to cases involving a prior action *settled* by the defendant's *insurer* (who would have little, if any, interest in asserting all the defendant's claims). In addition, the court has now held the bar effective as to a claim against the person to whom the plaintiff's liability may be imputed, since that person "could have been made a party." Thus, the possibilities of losing a valid cause of action by failing to assert a counterclaim have been considerably expanded.

Apparently, by saying that the owner "could have been made a party" and by citing as authority Rule 1.13(8),<sup>17</sup> which states that additional parties *may* be brought in to effectuate complete relief in a counterclaim, the court has defined a *compulsory* counterclaim in terms of those claims which a defendant *may* assert against the plaintiff.

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13. *Keller v. Keklikian*, 362 Mo. 919, 244 S.W.2d 1001 (1951). *But see* Wright, *Estoppel By Rule: The Compulsory Counterclaim Under Modern Pleading*, 38 MINN. L. REV. 423, 431 (1954).

14. *Pesce v. Linaido*, 123 So.2d 747, 750 (Fla. App. 1960).

15. See note 1 *supra*.

16. *Newton v. Mitchell*, 42 So.2d 53 (Fla. 1949).

17. FLA. R. CIV. P. 1.13(8): *Additional Parties May Be Brought In*. "When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants if jurisdiction of them can be obtained, and their joinder will not deprive the court of jurisdiction of the action."

The judicial goal of determining as much as possible in one litigation<sup>18</sup> may have been sought after too anxiously in the instant case. One wonders, if the owner had brought a separate action after the driver had accepted a settlement, would the motorist have been barred from asserting a counterclaim against the owner because of his failure to assert one against the driver in the first action?

ALEXANDER C. ROSS

## INTERNATIONAL LAW — SOVEREIGN IMMUNITY

The plaintiff-appellant, a Florida corporation, brought an action in assumpsit against the Republic of Cuba and procured writs of attachment against chattels of the defendant as well as garnishment of debts owing the defendant by garnishable co-defendants. The Consul General of the Republic of Cuba and his attorneys filed a motion to dismiss on the ground that a foreign state is immune from being made a defendant in an action of this kind. The plaintiff filed a motion to strike the motion to dismiss. The lower court sustained the defendant's motion to dismiss and overruled the plaintiff's motion to strike. On appeal, *held*, reversed: the defendant's act in hiring the plaintiff to promote tourism was non-governmental in nature and could not be invoked as a ground for sovereign immunity. *Harris & Co. Advertising v. Republic of Cuba*, 127 So.2d 687 (Fla. App. 1961).

The doctrine of sovereign immunity has been developed by judicial decision, based on policy considerations.<sup>1</sup> According to the doctrine, a sovereign may not, without its consent, be made a defendant in the

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18. 3 MOORE, FEDERAL PRACTICE § 13.12 (2d ed. 1948, Supp. 1960).

1. In this casenote, the words sovereign, state, and government are used as synonyms meaning an entity in which independent and supreme authority is vested.

The doctrine was said by Chief Justice Marshall to rest on this proposition:

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

The *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). For a complete history of the development of the doctrine of sovereign immunity see Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476 (1953); Borchard, *Government Liability in Tort*, 34 YALE L.J. 1 (1924); Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349 (1925). For an exhaustive discussion of this doctrine and its application in American and foreign courts see SUCHARITKUL, *STATE IMMUNITIES AND TRADING ACTIVITIES IN INTERNATIONAL LAW* (1959); SHEPARD, *SOVEREIGNTY AND STATE-OWNED COMMERCIAL ENTITIES* (1951).