

# EFFECT OF FEDERAL COMPULSORY COUNTERCLAIM RULE ON SUBSEQUENT OHIO ACTION— RES ADJUDICATA

*Horne v. Woolever*

170 *Ohio St.* 178, 163 *N.E.2d* 378 (1959)

In an action to recover damages for injuries sustained in an automobile collision, defendant pleaded a former consent judgment in his favor in federal court, contending that plaintiff should have asserted this claim in the federal court under the federal compulsory counterclaim rule.<sup>1</sup> The Ohio Supreme Court ruled in favor of the defendant's contention, holding that, even though Ohio does not have a compulsory counterclaim rule,<sup>2</sup> the impact of the federal rule resulting in a final judgment in federal court would be recognized and constitute *res adjudicata* in Ohio.

The concept of compulsion of counterclaim is not new. Professor Millar finds its earliest appearance in New Jersey as long ago as 1722.<sup>3</sup> However, a compulsory counterclaim rule did not appear in the federal courts until the adoption of the Federal Equity Rules of 1912<sup>4</sup> which rule was incorporated into the Federal Rules of Civil Procedure in 1938. At least eighteen states have adopted one form or another of a compulsory counterclaim rule for their own jurisdictions.<sup>5</sup>

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<sup>1</sup> Rule 13a, Federal Rules of Civil Procedure for the United States District Courts.

<sup>2</sup> See Ohio Rev. Code §§ 2309.14, 2323.40 (one who brings an action which he could have asserted as a counterclaim in a prior action cannot recover the court costs in the later action).

<sup>3</sup> Millar, *Civil Procedure of the Trial Court in Historical Perspective* 137 (1952). See Lloyd, "The Development of Set-off," 64 *U. Pa. L. Rev.* 541, 560 (1916).

<sup>4</sup> See Byron F. Babbitt, "Federal Judicial Code and Equity Rules" (1925).

<sup>5</sup> Professor Wright reports that thirteen jurisdictions (Alaska, Arizona, Delaware, Florida, Kentucky, Missouri, Nevada, New Mexico, Puerto Rico, Texas, Utah, Iowa and Minnesota) have rules almost identical to Federal Rule 13a. New Jersey's rule is compulsory only for those claims constituting "a liquidated debt or demand, or a debt or demand capable of being ascertained by calculation." [4] *N.J. Rev. Stat.* § 4:13-1. California appears to have a compulsory counterclaim rule but it is limited by definition of "counterclaim" (that which tends to "diminish or defeat the plaintiff's recovery") and the further rule that a defendant who wishes affirmative relief not so tending proceeds by "cross-complaint" (any claim "relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought") in which case his "cross-complaint" is not compulsory. *Cal. Code of Civ. Proc.* §§ 437 and 442. Idaho and Montana have rules much like California. West Virginia has a compulsory rule only in suits before a justice of the peace whose jurisdiction is limited to \$300 claims whereas his jurisdiction is optional with the parties in excess of that amount. *W. Va. Code* §§ 4978 and 4979(a) (1949). Arkansas is said to have a compulsory counterclaim rule by virtue of court interpretation of its pleading statutes. See Charles Alan Wright, "Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading." 38 *Minn. L. Rev.* 423 (1954). Wright does not categorize those states (Indiana, Nebraska, Oklahoma and Wyoming) which have rules making counterclaims permissive

The precise issue, whether or not a state court, not having a compulsory counterclaim rule in its own jurisdiction, would recognize the federal rule as *res adjudicata*, had not been met in Ohio and rarely has it ever been squarely met.<sup>6</sup> Many cases have arisen in states which also have a compulsory counterclaim of their own, wherein there was no question of recognizing the federal rule but merely a holding under that state's own similar rule.<sup>7</sup> The cases in the federal courts seem to fall into two categories tangential to our question. The first group involve the situation where an action was originated in a federal court, no counterclaim filed, and during the pendency of the federal action an independent action was brought in state court which should have been asserted as a counterclaim in the federal court. The question was whether the federal court could enjoin the state action under those circumstances. In each case, the federal court refused to abate the state action.<sup>8</sup> The second group of cases arose from the filing of an action in the federal court which *could* have been brought as a counterclaim in a prior *state* action. The courts there have held, even where the later action would have been a compulsory counterclaim had the original action been brought in federal rather than a state court, that the law of the state jurisdiction prevails as to the impact of a state's final judgment.<sup>9</sup> The Ohio Supreme Court relied on the latter line of cases to support its conclusion that the law of the first forum should be applied by the second forum.

By accepting finality of judgment and uniformity as the controlling policy factors, the court has escaped the difficult problem of determining if the federal rule itself is one of procedure or substance.<sup>10</sup> In applying this view, the Ohio court had only to decide the final impact of the federal rule in the federal court. The conclusion being that it was *res adjudicata* in

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yet assessing a court costs penalty on those who bring a separate action on claims which could have been counterclaims (as in the Ohio statute, *supra* note 2) as being compulsory counterclaim jurisdictions. Millar, on the other hand, classifies the latter as merely another, admittedly weaker, form of compulsion. Millar, *supra* note 3.

<sup>6</sup> *Meacham v. Haley*, 270 S.W.2d 503, 38 Tenn. App. 20 (1954) (held, that an omitted counterclaim in federal court is barred in an attempted action on it in state court. Tennessee does not have a compulsory counterclaim rule.) *Cf. Campbell v. Ashler*, 320 Mass. 475, 70 N.E.2d 302 (1946), noted 15 U. Chi. L. Rev. 446 (1948).

<sup>7</sup> See, e.g., *Hughes v. Holden*, 316 S.W.2d 710, 22 A.L.R.2d 621 (Ark. 1958); *Flickinger v. Swedlow Engineering Co.*, 45 Cal.2d 388, 289 P.2d 214 (1955); *Keller v. Keklikian*, 362 Mo. 919, 244 S.W.2d 1001 (1951); *Lacy v. Carson Manor Hotel, Inc.*, 297 S.W.2d 367 (Tex. Civ. App. 1956).

<sup>8</sup> *Red Top Trucking Corp. v. Seaboard Freight Lines, Inc.*, 35 F. Supp. 740, 742 (S.D.N.Y. 1940) (the court in discussing whether the state is bound by the federal rule or not said, "But that is the province of the state court, and it is a very different matter to ask the federal court to exercise its injunctive powers to insure that result."); *Fantecchi v. Gross*, 158 F. Supp. 684 (E.D. Pa. 1957) *appeal dismissed* 255 F.2d 299 (3d Cir. 1958).

<sup>9</sup> See, e.g., *Grodsky v. Sipe*, 30 F. Supp. 656 (E.D. Ill. 1940) (held, that since the state had no compulsory counterclaim rule, the claim was permissive only and might be asserted later in an independent federal action).

<sup>10</sup> Wright suggests this argument in his article cited *supra* note 5, at 435-436.

federal court, Ohio evidently felt that the impact of the rule was the same as if the counterclaim had been asserted in federal court and an adverse judgment handed down.

It is conceivable that an argument could be built against recognition of the federal rule by states on the ground that giving substantive effect to the rule allows the federal courts to cut off the right of a party in a state court for failure to comply with a "procedural" rule designed simply to expedite litigation in federal courts. It is generally agreed that the purpose of the compulsory rule is to reduce the volume of litigation and promote the speedy and inexpensive determination of controversies by barring re-litigation of the same set of facts.<sup>11</sup> Admitting that this is an honorable and sensible purpose, one might still ask why the rule should be allowed to sever the rights of a party on those facts in another jurisdiction, whose docket problems should be of no concern to the federal courts. If the state courts (or legislature, as the case may be) feel an urgent need for cleaning up their backlog, why haven't they established their *own* compulsory rule? From this point of view, might it not be argued that the *res adjudicata* doctrine is impractical in this situation, that its impact is too harsh when balanced against the interests of the parties on the merits of the case, and that the doctrine should therefore not be applied here.<sup>12</sup>

The Supreme Court of the United States has recognized the conflict between finality of decision and the policy against subversion of the forum state's policies by another state in the field of domestic relations. Upon the balancing of these interests, the Court chose to shelve the need for the certainty of finality of judgment among the states in favor of the need for protection of

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<sup>11</sup> *Id.* at 431; Millar, *supra* note 3 (note that Millar would limit the application of the rule to counterclaims which operate by way of defense to the principal claim).

<sup>12</sup> In writing of the merit of the concept of compulsion Wright states, "Indeed critics of such a rule are accustomed to present it in terms of the deserving widow, a horde of hungry orphans clutching at her tattered shawl; who is euchered out of her just claim against the scheming banker because of her inexperienced lawyer's failure to plead a compulsory counterclaim. The image lacks some elements of realism." Wright, *supra*, note 5, at 432. This colorful rebuttal of the critics of the compulsory rule, compelling though it may be, should not lead one into ignoring the fact that situations not altogether foreign to the one Wright describes *do* present themselves. In *Keller v. Keklikian*, *supra*, note 6, the defendant's *insurance counsel* dismissed his action with prejudice, ignoring the fact that defendant had a counterclaim which he had not yet asserted. Naturally, the court applied Missouri's compulsory counterclaim rule to defendant's attempt to re-establish himself in a separate action. *Cf.*, *Ross v. Stricker*, 153 Ohio St. 153, 91 N.E.2d 18 (1950), where the defendant's *insurer* satisfied a judgment in favor of plaintiff while defendant's *personal* lawyer had an appeal of the same action pending. The Ohio court held this was *res adjudicata* on defendant himself! Fortunately some courts will not permit this harsh consequence. See *Perry v. Faulkner*, 98 N.H. 474, 102 A.2d 908 (1954); *DeCarlucci v. Brasley*, 16 N.J. Super. 48, 83 A.2d 823 (1951). It is encouraging to note that in the noted case, the Ohio court cites the latter two cases, indicating that *Ross v. Stricker*, *supra*, may not be followed in the future.

the rights of the individual and the interest of the state of his domicile.<sup>13</sup> Therefore, such a result is not new and thus cannot be said to be unreasonable *per se*.

By accepting these policy considerations as controlling, the *res adjudicata* problem could be readily skirted by finding that the federal compulsory counterclaim rule is procedural only. Thus, it should be given no more extraterritorial effect than any other procedural rule which may be a bar to a cause of action in one jurisdiction, but not in another.<sup>14</sup>

Despite one's feelings as to the correctness of this ruling, it is important to the Ohio lawyer, as well as those of other states having no compulsory counterclaim rule, to note the problems inherent in this area.<sup>15</sup> This case is conclusive of Ohio's position as to the *federal* rule, but Ohio has not yet been faced with a similar rule of another *state*. Perhaps, in the face of the domestic relations decisions, the Ohio court may be receptive to the alternative argument suggested herein when dealing with a "hard" situation of the latter class.

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<sup>13</sup> See *Williams v. North Carolina (II)*, 325 U.S. 226 (1945); *Williams v. North Carolina (I)*, 317 U.S. 287 (1942).

<sup>14</sup> This argument finds support in the application of the *Erie Railroad* doctrine to the noted case. If the federal rule is substantive, then it would appear that the Ohio rule as to counterclaims should prevail in federal court. Since it clearly does not, it is logical to conclude the federal rule is purely procedural.

<sup>15</sup> In a footnote the Ohio court suggests that, under these circumstances, Ohio Rev. Code § 2309.19 *might* apply and create the same result as if plaintiff here (defendant in federal court) had expressly *released* defendant of any claim against him. A closer reading of the statute indicates that the court's interpretation of the statute is incorrect, thus the suggestion is without merit.