

Counterclaims and Intervening In Illinois

Although there are many similarities between the Federal Rules of Civil Procedure and the Illinois Rules of Civil Procedure, there are also some distinct differences. One such difference is how each set of rules handles cross- and counterclaims. In Federal courts, Federal Rule 13 governs cross- and counterclaims.¹ These types of claims are compulsory in Federal courts; they must be brought or are deemed waived. If a claim arises out of the same set of operative facts and involves the same parties as the initial lawsuit, then the Federal rules consider this a compulsory counterclaim.² There are some exceptions to this rule. For instance, if the claim is already pending in another case, it need not be brought again.³ The Federal Rules also anticipate cross claims. Cross claims are those that arise between coparties.⁴ Coparties are parties on the same side of the case, e.g. two defendants or two plaintiffs. These claims must arise out of the same transaction or occurrence as the original claim, or relate to property that is the subject matter of the original claim.⁵ Given the “use it or lose it” standard of the Federal rules, and the restrictions on what types of claims may be brought, it is clear that the Federal rules are designed to be restrictive. The rule is designed to prevent a multiplicity of actions and to achieve a resolution of all disputes arising out of common matters in a single lawsuit.⁶

In contrast, the Illinois rules are incredibly permissive. The Illinois Rules of Civil Procedure state: “Any claim by one or more defendants against one or more plaintiffs, or against one or more codefendants . . . may be pleaded as a cross claim in any action, and when so pleaded shall be called a counterclaim.”⁷ The first major difference to note is that the language of §2-608(a) is permissive. As such, there are no compulsory counterclaims in Illinois. So long as the parties to the counterclaim match some or all of those in the original lawsuit, a counterclaim may be raised regardless of its underlying facts.⁸ If a party that is not part of the original lawsuit is added via a counterclaim, then the counterclaim must “arise out of the same transaction, or series of transactions, as that set out in the complaint, and the new defendants must have an interest in that controversy.”⁹ This demonstrates a legislative intent to “relax the common-law limitations upon the scope of an action and to broaden the rules as to those who may be joined as parties.”¹⁰ This also represents a move towards judicial economy – by allowing parties to resolve their claims in one lawsuit, §2-608 prevents duplicitous lawsuits from clogging dockets. This is

¹ Fed. R. Civ. P. 13.

² Fed. R. Civ. P. 13(a)(1)(A)-(B).

³ Fed. R. Civ. P. 13(a)(2)(A).

⁴ Fed. R. Civ. P. 13(g).

⁵ *Id.*

⁶ *United States Gen., Inc v. City of Joliet*, 598 F.2d 1050, 1054 (7th Cir. 1979).

⁷ 735 ILCS 5/2-608(a).

⁸ See *Johnson v. Moon*, 3 Ill.2d. 561, 569 (Ill. 1954).

⁹ *Id.*

¹⁰ *Id.* at 568.

also reflected in the “power of the trial court to sever and to consolidate” matters.¹¹ Illinois courts have broad discretion to further the goal of judicial economy via the joinder of parties; however, this power is limited by the “same transaction or series of transactions” restriction mentioned above.¹²

To illustrate how the state counterclaim rules apply, consider the following hypothetical. Steve Johnson purchases Greenacre for \$500,000. He secures financing from First Bank. This financing is secured by a mortgage lien issued against Greenacre. A year later, Steve Johnson purchases a Porsche Boxter. To finance the purchase, he obtains an auto financing loan from First Bank. Two years later, Steve loses his job and defaults on both loans. As expected, Steve begins to receive letters from First Bank. The letters express the bank’s intent to foreclose upon its mortgage interest in Greenacre and repossess the vehicle. Like many consumers, Steve does not respond to the bank’s demands. One day, while leaving the site of a promising job interview, Steve is accosted by Larry Legbreaker, an employee of First Bank’s auto financing division. Larry threatens to beat up Steve and repossess the car unless Steve pays up his delinquent auto loan on the spot. Fearing for his safety, Steve retreats to the interior of his Boxter. Larry begins to shake the car in an attempt to flush Steve out of the car. Ultimately, Larry gives up and leaves the scene. Steve suffers from whiplash as a result of Larry’s car-shaking. He also receives a phone call from the potential employer, who witnessed the entire altercation. Steve is denied the job due to security concerns. Two weeks later, First Bank files a mortgage foreclosure action. Steve visits his lawyer, Dewey Cheatem. He tells Dewey about his run-in with Larry. Dewey suggests that Steve file a counterclaim in response to the mortgage foreclosure action. Dewey tells Steve that he has actions against both First Bank and Larry Legbreaker for assault, battery, tortious interference with a potential business contract, and violations of the Fair Debt Collection Practices Act.

Sadly, Dewey is wrong. Pursuant to the Illinois rules, Steve may assert his counterclaims against First Bank, but not against Larry. Why? Larry is an agent of First Bank, after all. Shouldn’t Larry be held to task for his actions? Yes, and the Illinois Rules of Civil Procedure would allow Steve to bring a separate action against Larry. However, a counterclaim against Larry would likely be barred pursuant to the rule set forth in *Johnson v. Moon*. Since Larry is not a party to the foreclosure case, any counterclaims brought against Larry as part of that case must arise from the same transaction or series of transactions as the foreclosure action. At best, Larry’s potentially tortious behavior is related to the auto finance transaction, not to the purchase of Greenacre and Steve’s subsequent default. It could be argued that the two purchases and related financing are part of the same series of transactions, but this argument would likely fail given the temporal distance between both transactions.

¹¹ *Id.*

¹² *Id.*

In general, the rules regarding counterclaims in Illinois are straight-forward. Any claim may be brought via a counterclaim, and may include any parties that are part of the original action. In a case with two plaintiffs and three defendants, any combination of those parties may file counterclaims against each other, regardless of subject matter. To bring in additional parties, those claims must be part of the same transaction, or series of transactions, as the original claim. Where the rules are unclear is what happens when one defendant files a counterclaim against another defendant, or when one plaintiff files a counterclaim against another plaintiff. Normally, this would be a non-issue. The various claims would be disposed of as to their respective parties without much issue. Where an issue may arise is when a potentially necessary party is not made a part of the counterclaim.

Imagine the following scenario: Rick Rube gives \$250,000 to Glenn Buck and Paul Ronne as an investment in their sure-fire, always-increases-in-value, never-fails gold investment program. Glenn and Paul are actually grifters from Nebraska whose last scam was the sale of musical instruments to schoolchildren in River City. Once they secure Rick's money and that of several others, they begin packing their bags for a permanent vacation in the Cayman Islands. Unbeknownst to Glenn, Paul has already taken the majority of the money out of the bank account associated with their gold scam as his name is the only name on the account. Only \$50,000 remains in the account after Paul's withdrawal. Before their departure date, both Glenn and Paul are served with a summons. Rick has wised up and filed a lawsuit against both men alleging fraud. As part of the lawsuit, Rick has frozen the gold scam's bank account. Glenn and Paul agree to remain in the country and resolve the lawsuit. Paul then flees to the Caymans with his nest egg in tow. Glenn, frustrated that he was left holding the bag, files a counterclaim against Paul alleging that Paul borrowed \$150,000 from Glenn and failed to repay the money. He further alleges that the frozen account to which Rick requests access contains some or all of the money lent to Paul.

In the above scenario, all of the claims are permissible. Rick's fraud claim against Glenn and Paul is fine, as is Glenn's claim against Paul. Every party involved in each claim is part of the original suit, so there is no concern as to whether the facts of each claim arise from the same transaction. However, Glenn asserts an interest in the same funds in which Rick asserts an interest. Rick wishes to prevent Glenn from asserting an interest in the gold scam account. Rick is hoping to obtain a default judgment against Paul, and gain access to the remaining funds in the account. However, Rick is not a party to the Glenn vs. Paul counterclaim. How can Rick intervene in the counterclaim? For that answer, we turn to the Illinois Rules of Civil Procedure and the section regarding intervention.

735 ILCS 5/2-408 states that parties may intervene in a case either by right or permissively.¹³ Intervention by right requires either an unconditional statutory right, where a party's interest would be inadequately represented by the existing parties, or where a party's

¹³ 735 ILCS 5/2-408(a)-(b).

interest in property that is subject to the suit would be diminished.¹⁴ Permissive intervention is allowed where a statute provides a conditional right to intervene or where the non-party's claim or defense shares a question of law or fact with the main action.¹⁵

In the case of Rick, Glenn and Paul, Rick can likely intervene in the counterclaim between Glenn and Paul. There is no statute that gives Rick the right to intervene, and neither Glenn nor Paul represent his interests, so the first two reasons for intervention by right are not met. However, Rick's fraud claim expresses an interest in the money held in the gold scam account. Glenn also asserts an interest in the funds. Therefore, Rick is "so situated as to be adversely affected by a distribution . . . of property . . . subject to the control . . . of the court."¹⁶ Illinois' intervention statute is to be "construed liberally 'to allow a person to protect an interest jeopardized by pending litigation to which he is not a party.'"¹⁷ Intervention by right is couched in command language ("shall"). This means that, once a threshold issue is determined, "the plain meaning of the statute directs that the petition be granted."¹⁸ Illinois courts will evaluate Rick's motion to intervene based on whether he would be prejudiced by a disposition of the claim between Glenn and Paul. "A non-party to an action 'is prejudiced or aggrieved in a legal sense when a legal right has been invaded or a pecuniary interest is directly, not merely indirectly, affected.'"¹⁹ In this sense, a judgment for Glenn and against Paul would not be legally binding on Rick. However, it would, "as a practical matter, have a material effect on [his] rights."²⁰ It seems rather clear that Rick could intervene by right. However, it is possible that a court may not find his potential interest in the funds crosses the necessary threshold.

Failing Rick's intervention by right, he should be able to permissively intervene. Although no statute confers upon Rick a conditional right to intervene,²¹ his claim and the main action, as well as the counterclaim have a question of law or fact in common.²² Quite simply, Rick's original fraud claim and Glenn's breach of contract claim both have a similar question of fact: to whom does the money contained in the gold scam account belong? Failing to include Rick as a party to Glenn's counterclaim could result in the same question being answered in two mutually exclusive ways. Such a result would frustrate the interests of both Rick and Glenn. Therefore, it makes sense that Rick should be allowed to intervene in Glenn's counterclaim, especially if Rick can provide evidence that establishes his interest in the funds sought by Glenn.

In conclusion, Illinois courts are bound by largely permissive rules. Although counterclaims between original parties can involve any subject matter, new parties cannot be

¹⁴ 735 ILCS 5/2-408(a).

¹⁵ 735 ICLS 5/2-408(b).

¹⁶ 735 ICLS 5/2-408(a)(3).

¹⁷ *City of Chicago v. John Hancock Mutual Life Insurance Company*, 127 Ill.App.3d 140, 144 (1st Dist. 1984).

¹⁸ *Id.*

¹⁹ *In re the Matter of the Special Prosecutor v. Downen*, 164 Ill.App.3d 183, 187 (5th Dist. 1987).

²⁰ *Emalfarb v. Krater*, 266, Ill.App.3d 243, 248 (2nd Dist. 1994).

²¹ 735 ILCS 5/2-408(b)(1).

²² 735 ILCS 5/2-408(b)(2).

added without privity of fact. When counterclaims between original parties implicate the interests of entities not party to the counterclaims, those entities may intervene by right or by permission.