FEDERAL PRACTICE
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a counterclaim in a cross-claim answer or one in a third-party answer.

But an endless chain of replies would be counterproductive and should not be encouraged. Thus, it is not surprising that federal courts have permitted a compulsory counterclaim to be asserted in a reply to the original answer or treated it as an amendment to the complaint,[2] thereby permitting the defendant to amend an answer to the original complaint, but have been less inclined to allow a permissive counterclaim to be asserted in a reply, although even in this context some courts appear to have permitted it.[3]

§ 1188. Counterclaim in a Reply

One federal court expressed the view in an early case under the rules that it would be an anomaly to permit a plaintiff to assert a counterclaim in a reply,[1] but a number of cases have held to the contrary.[2] It should be noted that some of these cases were based

2. Amendment to complaint

Downey v. Palmer, C.A.2d, 1940, 114 F.2d 116.

Cornell v. Chase Brass & Copper Co., D.C.N.Y.1943, 48 F.Supp. 979, affirmed C.A.2d, 1944, 142 F.2d 157.

3. Permissive counterclaim

Warren v. Indian Ref. Co., D.C.Ind.1939, 30 F.Supp. 281.

Clark, Code Pleading, 2d ed. 1947, § 101, at 650 n. 66.

See also § 1188.

§ 1188

1. Counterclaim in reply considered anomalous

Cornell v. Chase Brass & Copper Co., D.C.N.Y.1943, 48 F.Supp. 979, affirmed C.A.2d, 1944, 142 F.2d 157.

2. Counterclaim permitted in a reply

The counterclaims asserted by the plaintiff in a reply to counterclaims filed by the defendants are permissible in the same way as a motion to amend the complaint could be granted, that is, with leave freely given when justice so requires. United Magazine Co. v. Murdoch Magazines Distributors, Inc., D.C.N.Y.2003, 2003 WL 223462.

Electroglas, Inc. v. Dynatex Corp., D.C.Cal.1979, 473 F.Supp. 1167, 1171, **citing Wright & Miller.**

Southeastern Indus. Tire Co. v. Duraprene Corp., D.C.Pa.1976, 70 F.R.D. 585, 586 n. 2, **citing Wright & Miller.**

Evans v. S.S. Kresge Co., D.C.Pa.1972, 54 F.R.D. 536.

Joseph Bancroft & Sons Co. v. M. Lowenstein & Sons, Inc., D.C.Del.1970, 50 F.R.D. 415, 418, **citing Wright & Miller.**

Gretener, A.G. v. Dyson–Kissner Corp., D.C.N.Y.1969, 298 F.Supp. 350 (counterclaim in reply upheld against Rule 12(b) motion without discussion of propriety of procedure).

Ivey v. Daus, D.C.N.Y.1955, 17 F.R.D. 319.

Maison de Marchands Industrielle Ltee—Industrial Merchants, Ltd. v. New York Silicate Book Slate Co., D.C.N.Y.1952, 13 F.R.D. 15.

Mid–States Prods. Co. v. Commodity Credit Corp., D.C.Ill.1949, 10 F.R.D. 592.

partially on the former explicit reference to "a reply setting forth a counterclaim" in Rule 18(a), which deals with joinder of claims. This language was eliminated in 1966 as part of a complete revision of that rule. However, it is doubtful that the efficacy of the prior cases permitting a counterclaim in a reply has been impaired inasmuch as the Advisory Committee's Notes make it clear that the purpose of the 1966 amendment to Rule 18(a) had nothing to do with the point under discussion.[3] Subsequent cases validate this conclusion.

The question of permitting a counterclaim in a reply normally will arise only when the defendant has asserted a counterclaim in his or her answer. If the plaintiff has a claim arising from the same transaction as the one involved in the defendant's counterclaim—a claim that would constitute a compulsory counterclaim under Rule 13(a)—the plaintiff must assert it in the reply or risk being barred from bringing a later action on it. In this context, a counterclaim in the plaintiff's reply to the defendant's counterclaim seems entirely appropriate. It is not at all certain that the same would be true when the plaintiff's counterclaim is permissive—the claim arises out of a transaction other than the one on which the plaintiff originally sued upon or the transaction that underlies the defendant's counterclaim—or when the counterclaim is inserted in a court-ordered reply to new matter in the answer. Because of the risk of over-encumbering the action, it is far less clear that the plaintiff should be permitted to assert this type of a counterclaim in a reply. A more orderly procedure for achieving the same result might be for the plaintiff to seek to amend the original complaint to include the new claim; in many contexts severance of the counterclaim or separate trials will be an effective alternative and might avoid the possibility of confusion.[4]

Warren v. Indian Ref. Co., D.C.Ind.1939, 30 F.Supp. 281.

Bethlehem Fabricators, Inc. v. John Bowen Co., D.C.Mass.1940, 1 F.R.D. 274.

Downey v. Palmer, D.C.N.Y.1939, 31 F.Supp. 83.

But see

Turner & Boisseau, Chartered v. Nationwide Mut. Ins. Co., D.C.Kan.1997, 175 F.R.D. 686 (plaintiff cannot advance counterclaim in reply to defendant's counterclaim).

3. Advisory Committee Note

The Advisory Committee's Note is set out in vol. 12A, App. C.

4. Counterclaims in reply

Without a compelling reason, the plaintiff's reply counterclaims are barred when the court has decided previously that further amendments would be futile. United Magazine Co. v. Murdoch Magazines Distributors, Inc., D.C.N.Y. 2003, 2003 WL 223462.

AT & T Corporation v. American Cash Card Corp., D.C.N.Y.1999, 184 F.R.D. 515, **quoting Wright & Miller.**