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September 4 2015

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Indiana Trial Rule 13(J): Now More Cloudy Than Ever

In early American jurisprudence, the judicial system was divided among courts of equity and courts of law. In the most simple of terms, courts of law were embodied with the singular power in civil matters of awarding money and oversaw criminal cases. Courts of equity, however, implemented equitable doctrines that sought to address fairness in a capacity beyond the rigidity of the law. In this light, we might better understand Justice Oliver Wendell Holmes Jr.'s oft-attributed line: "This is a court of law, young man, not a court of justice." (Courts of law and equity were not merged–with the exception of bankruptcy courts that remain equitable courts–until 1938, three years after Holmes's death).

This distinction still remains in some states and, to a minor degree, within the federal system–i.e., bankruptcy courts. Indiana, however, is among the legion of states that long ago merged equity and law under the single umbrella of our circuit courts. The merger, as one might expect, was not always smooth. The problems were most pronounced in the merger of procedural doctrines and rules. As you can imagine, courts devised to meet out entirely different purposes utilized starkly contrasting procedures.

One such rough merger was in the realm of what are now called counterclaims. For the un-indoctrinated–those lucky souls whose minds have not been melted down and reformed in the shape of a "lawyer" by law school–counterclaims are claims brought by a party who has already been sued against the

party who sued him/her. It's a simple enough concept. Yet, 150 years ago, simple was not a word even remotely linked to counterclaims. In Indiana, courts of equity recognized cross-bills, thereby allowing a defendant to raise claims arising out of the claims initially raised. In courts of law, there was a similar procedure in the doctrine of recoupment. When law and equity merged, so too did these concepts.

A similar doctrine that was allowed only in equity courts was that of set-off. Set-off, derived from bankruptcy, allowed a defendant to bring a wholly unrelated claim. As Indiana Judge Byron Elliott recognized, "The essential difference between set-off and recoupment is that [set-off] may consist of a claim arising out of an independent contract; while in recoupment the damages claimed must flow from the same contract . . . or must grow out of the same transaction as that on which the plaintiff's cause of action is founded."

Ultimately, after a complicated journey, cross-bills and recoupment were merged into what would become compulsory counterclaims governed by Trial Rule 13(A) and permissive counterclaims under Rule 13(B). Under the modern rules, all counterclaims are either compulsory or permissive. Compulsory counterclaims are those that, like the language of cross-bills and recoupment, arise from the same transaction or occurrence as the chief claim. Such counterclaims are "compulsory" because they are required to be raised in the case or are barred from ever being brought. Permissive counterclaims are those that do not arise from the same transaction or occurrence but do arise between the same parties. For example, if Steve wrecks John's car and John owes Steve $200 for a sofa he agreed to buy but never paid, then if John sues Steve, Steven can either file a permissive counterclaim against John for the $200 of wait and sue him in a different case. In this manner, the counterclaim is permitted to be, but is not required to be, filed. As you can see, the permissive counterclaim mirrors the role once held by set-off.

Where the compulsory and permissive counterclaims differ from their originating doctrines of recoupment and set-off is that those doctrines did not originally permit affirmative recovery. That is, as those doctrines first existed, if Steve had chosen to sue John first, any claim by John against Steve could only be used to reduce the amount of money Steve could collect. Even if the damages to John's car were $500, all that could be accomplished was to prevent Steve from collecting any of the $200 he was otherwise owed. In this manner, it was an offset of the money owed. Although Rules 13(A) and 13(B) allow for affirmative recovery through counterclaims, set-off and recoupment still have a place in the modern rule.

This continued life is found in Rule 13(J). The function of Rule 13(J) is, on its face, straight forward. It provides limited circumstances in which a counterclaim can be raised even though the claim is beyond the statute of limitations. Keeping

with the limitation on set-off and recoupment, however, the claim cannot be brought for affirmative recovery–only to hinder the plaintiff's recovery. The rule states:

> The statute of limitations, a nonclaim statute or other discharge at law shall not bar a claim asserted as a counterclaim to the extent that:
>
> (1) it diminishes or defeats the opposing party's claim if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim, or if it could have been asserted as a counterclaim to the opposing party's claim before it (the counterclaim) was barred; or
> (2) it or the opposing party's claim relates to payment of or security for the other.

Although Indiana Trial Rule 13 is patterned on Federal Rules of Civil Procedure, Rule 13(J) has no federal counterpart–it is a distinctly Indiana rule. Due to the lack of federal authority upon which to rely, the history of Rule 13(J) has, as the Court of Appeals of Indiana has stated, produced "questions with cloudy answers."

Major clarity was finally added to the rule three decades after its adoption. In *Bacompt Systems, Inc. v. Ashworth*, the court of appeals sought to decipher subsection 1. Subsection 2 is a completely different story–it remains a mystery when the text is compared to the purpose as outlined by the committee that drafted the rule. *Bacompt* recognized that Rule 13(J)(1) embodies both permissive and compulsory counterclaims. The big difference between the compulsory counterclaims–"it diminishes or defeats the opposing party's claim if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim"–and the permissive counterclaim–"if it could have been asserted as a counterclaim to the opposing party's claim before it (the counterclaim) was barred"–is that the compulsory counterclaim can be brought at any time as a method to diminish the claim. The permissive counterclaim, however, is much more complicated. For the permissive counterclaim to be brought, the time to bring the claim cannot have expired prior to the accrual of the plaintiff's primary claim.

This past year, the journal for the Indiana State Bar Association–*Res Gestae*–ran an article entitled *The Resurrected Counterclaim: Ind. Trial Rule 13(J).* The article went through every source the author could get his hands on in interpreting Rule 13(J). I am familiar with the author's efforts, because, as you may have guessed, I was that author. I can assure you, 13(J) is not well developed through caselaw. In the nine months between when the article was accepted for publication, there were no developments on the rule.

Last week, the Court of Appeals of Indiana handed down what stands, for now at least, as a potential major alteration in the state of the rule. To avoid burying the lead any further, I think the court got this one wrong. As our regular readers will recognize, I am quick to praise and defend our courts here in Indiana. We are blessed with some of the finest judges imaginable. Nevertheless, I do, from time to time, disagree with a decision. *Delacruz v. Wittig* is such a case.

Though I'm always loathed to delve into the facts of a case, the facts are important. The court succinctly summarized the facts better than I could, here:

> On July 4, 2012, Deputy Delacruz was dispatched to a Putnam County residence on a report of an intoxicated party guest having seizures. During her investigation, party guests reported seeing a person underneath her vehicle possibly tampering with her brake lines. She called for backup, and when Deputy Barger arrived the two conferred. While they were doing so, they allegedly were assaulted by Wittig, who was also a guest at the party. Deputy Delacruz sustained abdominal, cervical, and thoracic injuries, as well as injuries to her knee and left shoulder. Deputy Barger suffered facial and knee injuries. The Deputies handcuffed and arrested Wittig at the scene.
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> In June 2014, the Deputies filed a tort action against Wittig seeking damages for the injuries they sustained during the July 4, 2012 party.1 In September 2014, Wittig filed an answer and raised a counterclaim pursuant to 42 U.S.C. § 1983, alleging that the Deputies used excessive force during his arrest and failed to intervene while other party guests used excessive force against him. In his counterclaim, Wittig sought compensatory and consequential damages as well as attorney fees and a setoff against any damages awarded to the Deputies pursuant to their complaint.
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> In November 2014, the Deputies filed a motion to dismiss Wittig's counterclaim as barred by Indiana's two-year statute of limitations for personal injury actions. The trial court denied the motion without a hearing or findings and certified its order for interlocutory appeal.

On appeal, the issue was whether the counterclaim, even though brought past the statute of limitations, could be raised under Rule 13(J)(1). As we discussed above, the first step in the 13(J)(1) analysis is to determine what kind of counterclaim is at issue. So the question, then, is whether the claims arise out of the same "transaction or occurrence" and therefore are compulsory. If they did not, then

they are permissive. Indiana courts have previously established "that the phrase 'transaction or occurrence' is to be broadly defined as 'a logical relationship' between the two causes of action, meaning that they arise from the same 'aggregate of operative facts.'" The court, correctly I think, determined that the claims arose from the same aggregate of operative facts, "and is therefore a compulsory counterclaim."

Where the court and I diverge begins with the following passage:

> Counterclaims are also categorized according to the nature of the relief sought. A counterclaim for affirmative relief is one that could have been maintained independently of the plaintiffs action. In contrast, a counterclaim in recoupment is defensive in posture.

For this proposition, the court relies on *York Linings International, Inc. v. Harbison-Walker Refractories Co.* The issue in *York Linings* was whether a counterclaim sought affirmative relief or constituted a recoupment as that term is applied in bankruptcy. If the counterclaim was a "recoupment" then it could meet a technical loophole to the automatic stay in bankruptcy.

Remember a few points from above. First, recoupment did not exist in equity in Indiana's system; it was a procedure of courts of law. Second, bankruptcy courts remain courts of equity. The recoupment at issue in *York Linings* was not the same "recoupment" as that which underlies compulsory counterclaims. Rather, it was the concept of "equitable recoupment." True, no where in *York Linings*, will you see the phrase "equitable recoupment." For that, however, you need dig only one layer deeper to the Ninth Circuit (federal) case *In re TLC Hospitals, Inc*. This is not a peculiar jaunt; *TLC Hospitals* is the case *York Linings* relies on for the function of recoupment under bankruptcy law. And third, bankruptcy courts are federal courts and–even to the extent they are subject to the federal rules of civil procedure as incorporated into the bankruptcy code–there is no federal counterpart to Rule 13(J).

In *York Linings*, the parties disputed the proper definition of "recoupment." The party arguing that the claim was a "recoupment" offered the definition from the 6th edition of Black's Law Dictionary: "[t]he right of the defendant to have the plaintiff's monetary claim reduced by reason of some claim the defendant has against the plaintiff arising out of the very contract giving rise to [the] plaintiff's claim[.]" The court, went with the 8th edition for the definitions it adopted:

> 1. The recovery or regaining of something, esp. expenses. 2. The withholding, for equitable reasons, of all or part of something that is due. 3. Reduction of a plaintiff's damages because of a demand by the defendant arising out of the same transaction. 4. The right of a

> defendant to have the plaintiff's claim reduced or eliminated because of the plaintiff's breach of contract or duty in the same transaction. 5. An affirmative defense alleging such a breach.

Notice that the 2004 edition includes a definition based on "equitable reasons."

So why does this matter? It matters because "equitable recoupment" has only been recognized in Indiana law as a mechanism in tax and bankruptcy law. Mind you, this is the fundamental premise upon which the entire *Delacruz* decision stands.

The *Delacruz* court utilized the definitions from the 6th edition as well. It is not at all clear, however, which of the cadre of definitions is the operative one. Notice that the fifth definition is just "an affirmative defense." As Indiana District Judge Baker recognized back in 1901, what is now "an affirmative defense"–defined by the 9th edition of the same source as "[a] defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true"–was a "plea"–whereby the defendant pleaded "a matter of fact"–not a counterclaim or its progenitor, recoupment.

Since the 8th edition, the 9th edition of Black's Law added a sixth definition for recoupment: "*Archaic*. A counterclaim arising out of the same transaction or occurrence as the one on which the original action is based." Is it labeled "*Archaic*"? Indeed. Recoupment as a doctrine in Indiana law is, as well, archaic, and it is the basis for compulsory counterclaims. Mind you, that is essentially the definition of compulsory counterclaim set forth in Rule 13(A): "if it arises out of the transaction or occurrence that is the subject-matter of the opposing party's claim[.]"

The court's analysis of the counterclaim under 13(J)(1) is confined to a single paragraph:

> Wittig does not appear to dispute that his counterclaim accrued as of the date of the incident but rather asserts that his otherwise time-barred counterclaim is rescued by Indiana Trial Rule 13(J)(1). In other words, he maintains that his counterclaim diminishes or defeats the Deputies' personal injury claims. We fail to see how. The undisputed facts indicate law enforcement personnel were assaulted while conducting their investigation and attending to an inebriated guest who was experiencing seizures. Wittig's counterclaim of excessive force focuses on the Deputies' alleged conduct during his arrest. Although both the Deputies' claim and his counterclaim arose during the same general occurrence, the party, Wittig never claimed self-defense to the

> assault itself, and he did not allege facts in his counterclaim to indicate how his success on his § 1983 claim of excessive force during arrest would diminish or defeat the Deputies' ability to establish liability on their primary claim of assault. As discussed, he admits that he could have filed his counterclaim as an independent action but did not do so. Thus, the counterclaim is clearly an affirmative one and not one merely one that seeks recoupment or setoff. Yet, in his brief, he argues that any damages he recovers against the Deputies on his counterclaim will "diminish or defeat" the damage award on their assault claim. The same could be said concerning all counterclaims for recoupment. This is why the rule salvages counterclaims in recoupment and not counterclaims such as Wittig's that seek affirmative relief. For affirmative counterclaims, Trial Rule 13(J)(1) simply does not operate to toll the statute of limitations.

The court, correctly, focuses on the initial clause of 13(J)(1). That clause was described in *Bacompt* as "clearly a compulsory counterclaim." Where the court gets hung up is the phrase "diminishes or defeats." It gets hung up here because it looks to a previously non-existent dichotomy, at least in Indiana law, between what is, in reality, equitable recoupment and a claim for affirmative recovery. As *Bacompt* recognized, the initial clause is just "compulsory counterclaims." There is no distinction under Rule 13 as to whether a party seeks affirmative relief with its counterclaim or simply to prevent the plaintiff from obtaining full recovery. That distinction is drawn solely because the applicable statute of limitations has otherwise barred the counterclaim. Once the counterclaim has been barred, 13(J) permits a loophole to allow that counterclaim, but only to the extent that it acts to diminish the amount that the plaintiff can take home.

The court further reads "diminishes or defeats the opposing party's *claim*" as synonymous with "diminishes or defeats the opposing party's *liability*." This overlooks that the claim encompasses both the theory of liability and the accompanying damages. A counterclaim that reduces the damages owed appears to meet the "diminishes or defeats the . . . claim" language. Instead, the "diminishes or defeats the . . . liability" approach reduces a counterclaim to an affirmative defense. Notice that the court says, "Wittig never claimed self-defense to the assault itself." (Self-defense is, of course, an affirmative-defense). There is no statute of limitations for an affirmative defense. Why then, would section 13(J)(1) be necessary to salvage an affirmative defense? The simple answer is that it isn't. Rule 13(J)(1), as *Bacompt* recognized, sets forth a framework allowing both compulsory and permissive counterclaims to be brought to reduce the plaintiff's recovery.

Something I suspect that played into the confusion, was the court's reliance

on *Indiana Department of State Revenue, Inheritance Tax Div. v. Estate of Daugherty*. If you look at that case in the mindset of there being a dichotomy of counterclaims seeking affirmative relief and counterclaims that seek only to diminish the recovery, then it's easy to be led astray by *Daugherty*. There, the Tax Court stated, "Here, the Estate sought *affirmative relief* with a counterclaim filed approximately 128 days after the probate court's initial determination." Out of context, that quotation seems to support the dichotomy. In context, however, it does not. What happened in *Daugherty* was that the probate court determined the tax liability for the estate. The estate had up to 120 days to challenge that determination. Eight days late, the estate challenged that determination and attempted to use 13(J)(1) to raise the untimely objection. There, the estate was trying to attack what had become a ripe judgment and sought repayment of money, not just to stave off an opposing party's claim.

I think the point that most clearly illustrates that the conclusion in *Delacruz* does not fit within the structure of 13(J)(1) is to consider the manifest injustice that has occurred simply because the claim was compulsory. If the counterclaim was permissive–i.e., a set-off–the defendant could have brought the claim under 13(J)(1); *Bacompt* makes that quite clear. (The claims accrued on the same day, so there is no timing issue with the counterclaim). Instead, because the matter has arisen out of the same operative facts, *Delacruz* stands for the requirement that the claim must stand to defeat the theory of liability.

This interpretation of 13(J) also undermines one of the most valuable functions of the rule. Let us use the facts of *Delacruz* as an example. Here, the defendant clearly was not of mind to bring a lawsuit in the first place. That is certainly his right. However, once he was dragged into a lawsuit, he sought to exercise the right's he otherwise would have had. If the plaintiffs had not waited so long to file suit, then he would have timely counterclaimed. Instead, this case sets up a potential perverse incentive for plaintiffs to wait and file their claims at the expiration of the statute of limitations. By doing so, they can hamstring defendants, as we have here. The function of 13(J) as it was understood prior to *Delacruz* prevented this. Sure, the defendant who had not himself wanted to file suit has waived his right to recover any money from the case. He has not, however, yielded his ability to discount the plaintiffs' recovery.

Imagine, if you will, a car accident between two cars, each with one driver. Let's say a two-year statute of limitations applies to each. Each driver suffered injuries. Driver A sues Driver B two days before the two-year anniversary of the accident. By the time the complaint and summons is served on Driver B, the statutory period has expired. Let us apply the reasoning of *Delacruz*.

Indiana is a comparative fault state. This means, that the jury will look at the accident and determine who was at fault for it and, based upon the varying degrees of culpability, assign some percentage to Driver A, some percentage to Driver B, and, if there were some other entity involved, some percentage to that non-party. Here, let's keep it simple and say that 100% will be split between A and B. B can raise the affirmative defense of comparative fault. He can argue, without filing a counterclaim, that A was more than 50% at fault for his own injuries. Mind you–importantly for our scenario here–Indiana only requires that the plaintiff be not more than 50% at fault. So, our jury comes back with a verdict for A for $250,000 in injuries and finds that each is 50% at fault. A's recovery will be reduced by 50%, and A walks away with $125,000 from B.

Remember, however, that I said B was also injured. Can B bring a claim for his injuries? Under *Delacruz*, the answer is no. You see, B's injuries do not effect his *liability* to A. B's injuries are also not an affirmative defense. Instead, B would need to bring a counterclaim. If we ignore *Delacruz*, B would be able to bring that counterclaim. Let's say that he did and in addition to the jury's findings of $250,000 in injuries to A and 50% of fault each way, the jury also finds B had suffered $300,000 in damages. Who gets what? Remember, A is entitled to $125,000 (half of $250k). B, per this verdict, is entitled to $150,000 (half of $300k). Because B did not file a claim before the statute of limitations expired, he cannot walk away with any money. B can, however, ensure that A does not take any money from B. B can match his judgment against that of A and zero A's out–like a deduction on your taxes. But that is not allowed by *Delacruz*.

I have said before that I think Rule 13(J) could stand to be revised. Now, more than ever, I think the solution is to revise the rule. If I may be so bold as to suggest a revision to 13(J)(1)–(J)(2) needs revised as well, but I am not so bold as to take that task on here. I suggest Rule 13(J)(1) be revised to read as follows:

> **(J) Effect of statute of limitations and other discharges at law.** The statute of limitations, a nonclaim statute or other discharge at law shall not bar a claim asserted as a counterclaim to the extent that:
>
> (1) it acts to reduce the opposing party's recovery if:
>
> (a) it is a compulsory counterclaim as provided in Rule 13(A); or
>
> (b) it is a permissive counterclaim as provided in Rule 13(B) and had not become otherwise barred prior to accrual of the opposing party's claim.

Join us again next time for further discussion of developments in the law.

<u>Sources</u>

- *Delacruz v. Wittig*, ---N.E.3d---, No. 67A04-1503-CT-127, 2015 WL 5056324 (Ind. Ct. App. Aug. 27, 2015).
- *Brady v. Mayor & City Council Laurel*, 40 Md.App. 373, 374 n.2, 392 A.2d 89, 90 n.2 (1978) (quoting Justice Holmes).
- *Standley v. Nw. Mut. Life Ins. Co.*, 95 Ind. 254 (1884).
- *Jewett Car Co. v. Kirkpatrick Const. Co.*, 107 F. 622 (C.C.D. Ind. 1901).
- *Bacompt Sys., Inc. v. Ashworth*, 752 N.E.2d 140, 143 (Ind. Ct. App. 2001), *trans. denied*.
- *York Linings Int'l, Inc. v. Harbison-Walker Refractories Co.*, 839 N.E.2d 766, 770 (Ind. Ct. App. 2005).
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- Ind. Trial Rule 13.
- Colin E. Flora, *The Resurrected Counterclaim: Ind. Trial Rule 13(J)*, 58 RES GESTAE 13 (March 2015).

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