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Civil Procedure—Relation Back of Barred Counterclaims Under Rule 13(f)

Authority exists for the proposition that the statute of limitations is more properly used as a shield, rather than a sword. More often than not, however, the statute in fact becomes a sword that severs life from a still viable claim for relief. In Butler v. Poffinberger, a federal district court prevented an omitted counterclaim from falling prey to the statute of limitations through application of Federal Rules of Civil Procedure 13(f) and 15(c).

On June 10, 1967, Poffinberger and Butler were injured in an automobile collision. Butler filed suit against Poffinberger and his employer in a federal district court, alleging that Poffinberger's negligence proximately caused his injuries. The attorney who represented both Poffinberger and his employer averred that "plaintiff [Butler] was guilty of negligence which proximately contributed in whole or in part to the accident described in the complaint." The attorney failed, however, to set forth a counterclaim for Poffinberger's injuries, assuring him later that the matter of any countersuit would be taken care of. In May, 1968, one month before the West Virginia statute of limitations was due to expire, the attorney notified Poffinberger that he would not handle the counterclaim. Three months after the statute expired, Poffinberger filed a motion to amend his answer under rule 13(f). Finding excusable neglect and inadvertence in Poffinberger's failure to assert the counterclaim earlier, the court granted leave to set up the counterclaim by amendment under rule 13(f). Because it "arose out of the precise 'conduct, transaction, or occurrence' on which the answer focused," the amendment was found to relate back to the date of the answer under rule 15(c). Thus, the terminal effect of the statute of limitations was avoided.

NOTES

1 Northern Pac. Ry. v. United States, 277 F.2d 615, 623 (10th Cir. 1960).
3 FED. R. CIV. P. 13(f) and 15(c). See notes 6 and 8 infra.
4 Jurisdiction was apparently based on diversity of citizenship.
5 49 F.R.D. at 9.
6 FED. R. CIV. P. 13(f) provides: "When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment."
7 49 F.R.D. at 10.
8 FED. R. CIV. P. 15(c) provides: "Whenever the claim or defense asserted in
In allowing the rule 13(f) amendment to relate back under rule 15(c) the federal district court rejected the reasoning of the Court of Appeals for the Sixth Circuit in Stoner v. Terranella. In Stoner, the defendant wished to assert an omitted counterclaim upon which the statute of limitations had run; he sought leave to amend his answer under rule 15(a) and argued that the amendment should relate back to the answer under rule 15(c). The court of appeals held that amendment under rule 13(f), rather than rule 15(a), was the proper method of asserting an omitted counterclaim. Commenting that rules 13(f) and 15(a) were "mutually exclusive," the court added that even had the defendant sought leave to amend under rule 13(f), the amendment would not relate back under rule 15(c). Relation back under rule 15(c) applied only to amendments made pursuant to rule 15(a), not rule 13(f).

Although the court in Stoner failed to enunciate the motivating rationale behind the decision, the outcome was most likely justified from a logical standpoint. The court perhaps noted, sub silentio, that relation back of rule 13(f) counterclaims had never before been attempted. Notwithstanding this fact, the court was probably impressed with other cases holding that rule 13 had no application to counterclaims upon which the statutory period had elapsed. Arguably, if rule 13 had no application to counterclaims barred by the statute of limitations, then rule 15(c) could not be used in conjunction with rule 13(f) amendments because the whole amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."
purpose of relation back is to avoid the statute of limitations. Even more persuasive, however, was the fact that the drafters of the federal rules gave no indication that rule 13(f) amendments were to relate back under rule 15(c).\textsuperscript{16} Indeed, the court in \textit{Stoner} might have reasoned had the drafters intended for rule 13(f) amendments to relate back they could have easily made provision for such an effect. The fact that no such provision was considered, or even commented upon, is some evidence that the rules should not be so used, especially in light of the strong substantive policy reflected by the statute of limitations. There is something inherently unfair in allowing the defendant to withhold his claim until the statutory period has expired, and then permit him to assert it in an amendment that relates back to the date of the pleading. It seems most improper when one considers that the defendant could have easily brought suit as a party plaintiff long before the statute of limitations expired on his claim for relief. The court in \textit{Stoner} thus concluded that the federal rules were not designed to protect defendants who had slept upon their rights.

While the decision in \textit{Stoner} appears correct on the surface, it is submitted that a more extensive analysis might have led that court to reach the opposite result\textsuperscript{17} and would indicate that \textit{Poffinberger} was correctly decided. One reason so few defendants have attempted to assert statutory barred counterclaims through use of rule 15(c) is that most states hold that the statute of limitations is tolled by the filing of the complaint.\textsuperscript{18} As a result, in most instances resort to rule 15(c) is not necessary. Fur-


\textsuperscript{17} The court in \textit{Stoner} cited Barron and Holtzoff as authority for the proposition that rule 15(c) applies only to rule 15(a) amendments. Barron and Holtzoff does impart that "[t]he question whether an amendment relates back under rule 15(c) is of importance only with regard to those amendments made pursuant to rule 15(a)." 1A \textit{BARRON AND HOLTZOFF} § 448, at 760 (1960). However, a proper reading of that section indicates that the authors were speaking of excluding \textit{rule 15(b)} from the operation of the relation back provision. \textit{Id.} Indeed, Barron and Holtzoff's review of \textit{Stoner} provides that "[t]his is not a necessary reading of the rules, and if the other tests of relation back are satisfied, the doctrine seems as desirable applied to counterclaims as to any other amended pleading." \textit{Id.} § 448, at 74 (Supp. 1969).

thermore, reliance upon cases holding that rule 13 has no application to barred counterclaims seems unwarranted; no attempt was made in those cases to bring the counterclaim within the scope of rule 15(c). Rather, the cases focused upon whether the language of rule 13(c) allowed the counterclaims to be asserted regardless of whether the statute of limitations had run.

The absence of an express federal rule covering relation back of counterclaims may have improperly influenced the court in Stoner. Rule 15(c) was obviously designed to alleviate the problems encountered when the statutory period elapsed after a pleading was filed, leaving the claims and defenses arising from a single transaction inadequately reflected. The drafters of the federal rules allowed amended pleadings setting forth these omitted matters to relate back, recognizing that once an opposing party has been put on notice as to the transaction being litigated the purpose of the statute of limitations has been served. Unlike in Stoner, the court in Poffinberger recognized that allowing counterclaims to relate back comports to this policy of notification equally as well as other amended pleadings. If the policy of the federal rules is to decide cases on their merits and not on technicalities, the statute of limitations should not bar defendant's same-transaction-counterclaims.

The logical place to begin an interpretive inquiry into the correct meaning of the federal rules is the language of the rules themselves. Rule 13(f) states that the "[defendant] may by leave of court set up the counterclaim by amendment." Rule 15(c) requires only that an "amendment" arise from the same transaction as the original pleading. There is nothing in the language of the two rules to indicate that the term "amendment" in rule 15(c) does not apply to amendments asserting omitted counterclaims under rule 13(f). There is certainly no indication that rule 15(c) applies only to amendments made pursuant to rule 15(a). Moreover, rule 13(f) amendments meet the requirements of

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21 See generally F. JAMES, CIVIL PROCEDURE § 10.17 (1965) [hereinafter cited as JAMES].
22 Copeland Motor Co. v. General Motors Corp., 199 F.2d 566, 567-68 (5th Cir. 1952).
25 "If ... [rule 15(c)] was meant to encompass less than all the amendments
rule 15(c) that the claim set up by amendment arise from the same transaction as the original pleading. If, as in Poffinberger, the counterclaim arises from the same occurrence set forth in the original pleading, the plaintiff has the required notice and relation back should be allowed. When careful examination of the language of the rules is combined with the policy of liberal construction of the amending provisions,\(^2\) it is clear that the decision in Poffinberger, rejecting the reasoning of the court in Stoner,\(^2\) was correct. Rule 13(f) amendments should be allowed to relate back under rule 15(c).\(^2\)

There is at least one narrow situation where the relation back theory of Poffinberger may prove unworkable: where the plaintiff's complaint is filed so near the expiration date of the statute of limitations, that the answer, even though timely under rule 12(a),\(^2\) is served after the statute has run.\(^3\) A rule 13(f) amendment asserting a barred counterclaim and relating back to the time of the answer, as in Poffinberger, would still be barred by the statute of limitations. In order to alleviate his plight, the defendant could urge that since the counterclaim asserted in his amended pleading arose out of the same conduct, transaction, or occurrence with which the suit is concerned, the court should interpret "original pleading" in rule 15(c) to mean the plaintiff's complaint, not the defendant's answer. From a policy standpoint, the court should recognize that the purpose of the statute of limitations is to keep stale litigation out of the court.\(^3\) It should be aimed at barring untimely lawsuits, rather

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\(^2\) Commissioner v. Finley, 265 F.2d 885, 888 (10th Cir.), cert. denied, 361 U.S. 834 (1959).

\(^3\) It is at least plausible that the court in Stoner wanted to avoid deciding whether relation back was substance or procedure under Erie R.R. v. Tompkins, 304 U.S. 64 (1938). This avoidance seems unnecessary in light of the Supreme Court's decision in Hanna v. Plumer, 380 U.S. 460 (1965), which apparently directs a federal court to apply the federal rule of relation back. Id. at 471. See also 3 J. Moore, Federal Practice ¶ 15.15[2] (2d ed. 1968) [hereinafter cited as Moore].

\(^4\) Cf. 1A Barron and Holtzoff § 448, at 74 (Supp. 1969).

\(^5\) Fed. R. Civ. P. 12(a) states in part: "A defendant shall serve his answer within 20 days after service of the summons and complaint. . . ."

\(^6\) Allowing the plaintiff's claim to be litigated while barring the defendant's counterclaim might well encourage the plaintiff to utilize the statute of limitations to avoid the defendant's counterclaims. This result is diametrically opposed to the purpose of statutes of limitation. See e.g., Azada v. Carson, 252 F. Supp. 988, 989 (D. Hawaii 1966) (complaint was filed two days before the statute ran). See generally James § 10.17, at 489.

\(^7\) Cf. James § 10.17, at 489.
than justiciable issues still capable of litigation.\textsuperscript{32} The statute was designed to "assure fairness . . . 'by preventing surprises through the revival of claims which had been allowed to slumber . . . .'"\textsuperscript{33} If it were held that the term "original pleading" in rule 15(c) meant the plaintiff's complaint, the rule in some jurisdictions that the statute of limitations is not tolled by the filing of the complaint\textsuperscript{34} would be completely circumvented. The federal court would not only be able to adjudicate a complete controversy arising out of the same transaction, but the plaintiff would be precluded from using a statute initially designed to protect defending parties\textsuperscript{35} as an offensive weapon.\textsuperscript{36}

If the complaint is interpreted as the "original pleading" for purposes of rule 15(c), consequently tolling the statute of limitations, the issue becomes that of protecting the plaintiff from an intentionally dilatory defendant. Rule 13(f) demands that defendant's failure to assert timely an omitted counterclaim result from oversight, inadvertence, or excusable neglect; leave to amend will not be granted if failure to assert the counterclaim was for a frivolous reason. On the other hand, if defendant's failure to raise the counterclaim was truly inadvertent, as in Poffinberger, leave to amend will be granted, but the plaintiff will not be prejudiced, "at least not in a way the statute of limitations was designed to protect."\textsuperscript{37}

Although federal court defendants can rely on the court's interpretation in Poffinberger of the relationship between rules 13(f) and 15(c), the impact of the decision may have far-reaching consequences for those states that adhere to the view that the statute is not tolled by the filing of the complaint and have adopted rules of procedure similar to the federal rules. In North Carolina, for example, the cases suggest that the statute of limitations continues to run after the filing of the complaint.\textsuperscript{38} What

\textsuperscript{32} United States v. Western Pac. R.R., 352 U.S. 59, 72 (1956).
\textsuperscript{34} Many jurisdictions hold that the filing of the complaint tolls the statute of limitations only as to claims for recoupment, \textit{i.e.}, the defendant can assert a claim arising out of the same transaction to prevent or reduce the plaintiff's recovery, but he cannot affirmatively recover. \textit{See}, \textit{e.g.}, Bull v. United States, 295 U.S. 247, 262 (1935); Harvey Coal Corp. v. Smith, 268 S.W.2d 634 (Ky. 1954).
\textsuperscript{36} \textit{See generally} Northern Pac. Ry. v. United States, 277 F.2d 615, 623 (10th Cir. 1960); \textit{JAMES} §10.17.
result can be anticipated when a defendant fails to assert a counterclaim upon which the statutory period has elapsed? If the North Carolina courts adopt the rationale used in *Poffinberger*, the statute will be effectively tolled with respect to the counterclaim the defendant has failed to allege. Rule 13(f) of the North Carolina rules is to identical to the federal rule. However, North Carolina rule 15(c) is somewhat different. It provides that

[A] claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.\(^4^1\)

The defendant will probably be allowed to assert a statutorily barred counterclaim if his answer apprises the plaintiff of the transaction upon which his claim rests.\(^4^2\) The official comment to the North Carolina rules indicates such a result by stating that "[t]he amended pleading will . . . relate back . . . even if the new pleading constitutes a new cause of action, provided that the defending party had originally been placed on notice of the events involved."\(^4^3\)

In those jurisdictions in which the *Poffinberger* rationale is adopted, many of the vestiges of a harsh, inequitable, and often confusing rule can be eliminated. Subject to rule 13(f) safeguards, the plaintiff no longer will be allowed recovery while the defendant's claim for relief arising from the same transaction is barred by the statute of limitations. Upon a showing of inadvertence or excusable neglect, the defendant should be allowed to assert an omitted counterclaim by amendment, and the amendment

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\(^{39}\) N.C.R. Civ. P. 13(f).

\(^{40}\) N.C.R. Civ. P. 15(c).

\(^{41}\) Id. North Carolina rule 15(c) was modeled after the New York procedural rule governing amended pleadings, N.Y. Civ. Prac. Law § 203(e) (McKinney 1963). That rule has been interpreted as allowing the relation back of barred counterclaims if an affirmative defense is alleged in the answer. Such a defense would give the plaintiff notice of the transactions to be proved in the amended pleading. *A Biannual Survey of New York Practice, 39 St. John's L. Rev. 412-13* (1965).

\(^{42}\) Based upon New York's experience under a similar rule, North Carolina courts may allow relation back of barred counterclaims only when the answer has set forth an affirmative defense alleging the precise conduct to be proved in the amended pleading. *See Nichimen & Co. v. Framen Steel Supply Co., 44 Misc. 2d 260, 253 N.Y.S.2d 713* (Sup. Ct. 1964).

\(^{43}\) N.C.R. Civ. P. 15, comment (c).
REMITTING PARTIES’ CROSS-APPEAL

should be allowed to relate back to the “original pleading” to avoid the bar of the statute. “[I]t is a natural and salutary development to toll the statute of limitations on all causes of action arising out of the transaction initially pleaded, regardless of legal theory.”

C. H. Pope

Civil Procedure—Remittitur—Remitting Parties’ Right to Cross-Appeal

With its recent decision in Mulkerin v. Somerset Tire Service, Inc. New Jersey allied itself with Wisconsin in permitting a plaintiff who had accepted remittitur in the trial court to obtain appellate review of the lower court’s determination of the damage issue by means of a cross-appeal. In so doing, New Jersey broke with widely accepted precedent at common law which denies all opportunities to the remitting party to complain on appeal. Although four states currently provide the remitting party with some method for review by statute or rule of civil procedure, only Wis-

See, e.g., Plesko v. City of Milwaukee, 19 Wis. 2d 210, 120 N.W.2d 130 (1963).
NEB. REV. STAT. § 25-1929 (1943): Whenever the court shall direct a remittitur in any action, and the same is made, and the party for whose benefit it is made shall appeal said action, then the party remitting shall not be barred from maintaining that the remittitur should not have required either in whole or in part.
N.Y. CIV. PRAC. LAW § 5501 (McKinney 1963): (a) An appeal from a final judgment brings up for review:

5. a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent’s stipulation on a motion to set aside the verdict as excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.

TENN. CODE ANN. § 27-118 (1955): In all jury trials had in civil actions, after the verdict has been rendered, and on motion for a new trial, when the trial judge is of the opinion that the verdict in favor of a party should be reduced, and a remittitur is suggested by him on that account, with the proviso that in case the party in whose favor the verdict has been rendered refuses to make the remittitur a new trial will be awarded, the party in whose favor such verdict has been rendered may make such remittitur under protest, and appeal from the action of the trial judge to the Court of Appeals; and if, in the opinion of said Court of