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Pre-Judgment Enforcement of Federal Rule of Civil Procedure 13(a)

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PRE-JUDGMENT ENFORCEMENT OF FEDERAL RULE OF CIVIL PROCEDURE 13(a)

Federal Rule of Civil Procedure 13(a) requires resolution of related claims between the same parties in a single lawsuit,[1] but it does not specify how the courts are to enforce this policy. Typically, Rule 13(a) operates after judgment to bar a second suit based on a claim that should have been pleaded as a compulsory counterclaim in the initial suit.[2] However, neither Rule 13(a), nor its Advisory Committee's Notes, provide an explanation of the pre-judgment consequences of a party's failure to comply.[3] As a result, the courts continue to display confusion and inconsistency as to what procedure a court should follow when a defendant in a federal suit fails to state a compulsory counterclaim in the initial action but brings a separate suit on the claim, in federal or state court, subsequent to the commencement of the first action but prior to judgment in that action.[4]

This Note addresses the efforts of the courts to advance the policies of Rule 13(a) and proposes a consistent pre-judgment procedure for the courts to follow when a party fails to comply with the Rule. Part I summarizes the purpose behind Rule 13(a). Part II

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1 Federal Rule of Civil Procedure 13(a) states in full:

> Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

FED. R. CIV. P. 13(a).

2 *See* cases discussed *infra* note 9.

3 The Advisory Committee's Notes to Rule 13(a) address only the post-judgment consequences, stating that "[i]f the action proceeds to judgment without the interposition of a counterclaim as required by [the rule], the counterclaim is barred." FED. R. CIV. P. 13(a) advisory committee's note 7.

4 Wright and Miller summarize the problem as follows:

> Although it is well established that a party is barred from suing on a claim that should have been pleaded as a compulsory counterclaim in a prior action, one closely related question remains unsettled. What would prevent a party who does not want to assert his claim as a compulsory counterclaim in a suit instituted by his opponent from bringing an independent action on that claim while the first action is pending?

6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1418, at 103 (1st ed. 1971) (footnote omitted) [hereinafter C. WRIGHT & A. MILLER].

analyzes how the courts effectuate this purpose when the defendant brings his independent suit in another federal court. Part III deals with the situation in which the defendant brings his independent action in a state court. Each part first analyzes the various current approaches of the courts and then attempts to propose a consistent approach that advances the purposes of Rule 13(a) without unduly sacrificing fairness to the parties.

Part II concludes that the two federal courts should cooperate and use various procedural devices at their disposal including interdistrict transfer and interdistrict injunctions to consolidate the two actions. Before either court takes steps toward consolidation of the claims, however, the initial court obtaining jurisdiction over the parties should balance certain competing interests to resolve which of the two courts is the more appropriate forum for the action. Part III concludes that the concerns behind Rule 13(a) will generally be outweighed by the interest in allowing claimants access to an independent state judicial system, but that in certain situations, a state court should abate its action so as to effectuate the Rule's purpose.

I
BACKGROUND

A. Purpose of the Rule: Preventing Repetitive Litigation

The essential purpose behind the compulsory counterclaim rule is to prevent repetitive litigation and the resulting waste of judicial resources.[5] As the Supreme Court has stated:

> The requirement that counterclaims arising out of the same transaction or occurrence as the opposing party's claim "shall" be stated in the pleadings was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters. The Rule was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint.[6]

Thus, courts treat the Rule as generally requiring the resolution of claims arising out of the same transaction or occurrence, and between the same parties, in a single lawsuit. For example, in *United States v. Eastport Steamship Corp.*,[7] the court declared that "[t]he underlying purpose of the rule is to force disposition in one action of

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5 *See, e.g., id.* at § 1409, at 37 ("The reason for compelling the litigant to interpose compulsory counterclaims is to enable the court to settle all related claims in one action, thereby avoiding a wasteful multiplicity of litigation on claims arising from a single transaction or occurrence.").

6 Southern Constr. Co. v. Pickard, 371 U.S. 57, 60 (1962) (per curiam).

7 255 F.2d 795 (2d Cir. 1958).

all claims which have arisen between the parties to that litigation."[8]

B. Defining the Problem: Limiting Rule 13(a) Application to Post-Judgment Proceedings

Some courts interpret Rule 13(a) as having no effect until a judgment is rendered in the initial action. For example, in *Bellmore Sales Corp. v. Winfield Drug Stores, Inc.*,[9] the court allowed the plaintiff, Bellmore, to adjudicate a claim that should have been asserted as a compulsory counterclaim in a suit pending in another federal court. Bellmore's claim arose out of the same transaction as Winfield's claim, pending in the prior action. Winfield moved for dismissal on the grounds that Rule 13(a) required that Bellmore assert its claim as a compulsory counterclaim in the prior pending action.[10] Relying on the language of Advisory Committee's Note 7,[11] the court held that "[i]t is only after [the] action proceeds to judgment that any compulsory counterclaim . . . will be barred."[12] Because the first action was still pending, the court denied the motion.[13]

The *Bellmore* approach has a number of shortcomings, the foremost of which is that it frustrates the efficiency goal of Rule 13(a).[14] As stated by the Supreme Court, the Rule "was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters."[15] The *Bellmore* rule allows a party to pursue an independent action on a compulsory counterclaim whenever he can get to the second courthouse before the

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8 *Id.* at 805. The policy interest in preventing duplicative litigation is not confined to the compulsory counterclaim situation. For example, similar problems arise when the same plaintiff brings the same claim against the same defendant in more than one court. Another closely analogous situation arises when a claimant seeks relief in one court, while his opponent seeks a declaratory judgment resolving his liability on that claim in another court. What is unique about the counterclaim situation is that, in addition to sound policy favoring consolidation of the claims, failure to consolidate generally involves violating a federal rule. This Note focuses on this latter situation.

9 187 F. Supp. 161 (S.D.N.Y. 1960). *See also* ACF Indus., Inc. v. Hecht, 284 F. Supp. 572, 574 (D. Kan. 1967) (Rule 13(a) "defense does not arise until after the other action has proceeded to judgment"); Local 499, Int'l Bhd. of Elec. Workers v. Iowa Power & Light, 224 F. Supp. 731, 738 (S.D. Iowa 1964) ("A plaintiff's claim should not be dismissed on ground that it should have been raised as a compulsory counterclaim in a prior action, where such prior action is still pending and has not proceeded to judgment."). The more recent cases indicate that this approach is no longer followed. *See, e.g.*, Donaldson, Lufkin & Jenrette, Inc. v. Los Angeles County, 542 F. Supp. 1317 (S.D.N.Y. 1982) (dismissing suit brought on a claim that was subject to the compulsory counterclaim rule in a pending suit). For a more complete discussion, see *infra* note 26 and accompanying text.

10 187 F. Supp. at 162.

11 *See supra* note 3.

12 187 F. Supp. at 162.

13 *Id.*

14 *See supra* notes 5-7 and accompanying text.

15 Southern Constr. Co. v. Pickard, 371 U.S. 57, 60 (1962) (per curiam).

first court renders its judgment. If the second court reaches a judgment before the first court, the party bringing that second action will have effectively circumvented the Rule.[16] Since the contemporaneous lawsuits often involve related and even identical issues, as well as the same basic facts and witnesses, the *Bellmore* approach produces the wasteful, duplicative litigation that the Rule was intended to eliminate.[17]

Moreover, the *Bellmore* rule encourages disruptive races to litigation as each party attempts to have its chosen court render the first judgment.[18] Under the *Bellmore* court's interpretation of Rule 13(a), a judgment in the first action requires the second court to dismiss. Thus, the plaintiff in each action will try to expedite the proceedings, while the defendant in each action will try to delay. The incentive to rush may hamper the plaintiffs' ability to give sufficient attention to aspects of the suit such as discovery, thereby decreasing the possibility of a full and fair trial. Meanwhile, the incentive to delay may produce frivolous motions which waste the courts' and the parties' time and resources.

In most cases, the doctrine of issue preclusion[19] will apply, making a judgment in either action conclusive as to the issues concerning the claim in the other action. This possibility will reinforce the incentives for each party to expedite the proceedings on his own claim, while using delay tactics in the proceedings concerning the opposing party's claim. By contrast, where issue preclusion does not apply,[20] the *Bellmore* rule produces a race to the courthouse, as

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16 *See, e.g.*, Vestal, *Reactive Litigation*, 47 IOWA L. REV. 11, 13 n.14 (1961) (Limiting the effect of the Rule to post-judgment bar would mean "that the original defendant can bring his reactive suit and, if he can get a judgment before the judgment in the initial action, the compulsory counterclaim provision is meaningless to him.").

17 *See supra* note 5 and accompanying text.

18 *See, e.g.*, Columbia Plaza Corp. v. Security Nat'l Bank, 525 F.2d 620, 626 (D.C. Cir. 1975) (avoiding duplicative suits serves economic interests as well as "eliminating the risk of inconsistent adjudications and races to obtain judgments"); ACF Indus. v. Guinn, 384 F.2d 15, 19 (5th Cir. 1967) (allowing the two duplicative suits to go forward would produce "an unwanted and highly undesirable race by each party to obtain a decision from the particular district court reacting most favorably to its position"). Professor Vestal describes concurrent suits between the same parties, but in reversed positions, concerning the same factual controversy, as "reactive litigation." Vestal, *supra* note 16, at 11. He argues that "[t]here is a real danger that there will be an unseemly race to litigate where reactive litigation is pending." *Id.* at 16.

19 Issue preclusion prevents a party from relitigating any issue that has been conclusively adjudicated in a prior action that has reached judgment. "A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment." RESTATEMENT (SECOND) OF JUDGMENTS § 17(3) (1980).

20 Issue preclusion does not apply when two claims, though arising out of the same transaction or occurrence, do not involve precisely the same issues. *Id.*

well as a race to judgment, because the party initiating the first action can avail himself of Rule 13(a)'s explicit exception for pending claims.[21] In that situation, a judgment in the first action invokes the Rule 13(a) bar, thereby disposing of the claim in the second action. A judgment in the second action, however, does not affect the claim in the first action because Rule 13(a) does not apply to this previously pending claim. The resulting race to the courthouse may cause the parties to litigate the suit prematurely, at a time that is inconvenient to the parties and witnesses.[22]

The *Bellmore* court relied on the language of the Advisory Committee's Note[23] to support its position that Rule 13(a) acts as a bar only after judgment. The Note, however, does not state that the Rule shall have no effect prior to judgment; it merely states that a compulsory counterclaim is barred if not asserted prior to judgment. Arguably, this language might indicate by negative implication that the drafters did not intend the Rule to have any pre-judgment effect. But such an argument fails to justify an interpretation that directly conflicts with the Rule's purpose. The Rule's efficiency purpose dictates that the Rule have a pre-judgment effect, so as to avert duplicative litigation.[24] Furthermore, Rule 1 of the Federal Rules requires the courts to construe the rules so as to advance fairness.[25] By permitting simultaneous proceedings in two courts concerning substantially identical issues and by creating a situation in that the party who wins the race to judgment chooses the forum which ultimately resolves both parties' claims, the *Bellmore* approach advances neither fairness nor efficiency.[26]

C. Second Action in Same Federal Court: Consolidation Under Rule 42(a)

Bellmore demonstrates the inadequacies of limiting the application of Rule 13(a)'s bar to post-judgment cases. However, allowing

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21 "But the pleader need not state the claim if . . . at the time the action was commenced the claim was the subject of another pending action. . . ." FED. R. CIV. P. 13(a).

22 *See also* Vestal, *supra* note 16, at 16-17 ("The pressure of the race to litigate is especially great in some jurisdictions with compulsory counterclaim provisions.").

23 *See supra* note 3.

24 *See supra* notes 5-8, 15-17 and accompanying text.

25 Federal Rule of Civil Procedure 1 states, in part, that "[t]hese rules . . . shall be construed to secure the *just*, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1 (emphasis added).

26 Not surprisingly, the overwhelming majority of courts have rejected this approach, as the cases discussed throughout the remainder of this Note will make clear. Thus, the difficulty becomes not whether to consolidate the two pending actions, but in what manner to do so. *See, e.g.*, Pumpelly v. Cook, 106 F.R.D. 238, 239 (D.D.C. 1985) ("Since it is clear that the complaint in this action should have been pleaded as a compulsory counterclaim . . . , the remaining question is how to go about consolidating the separate proceedings.").

the Rule to take effect prior to judgment in the first action raises the question of how the two courts with jurisdiction over the parties should effectuate the Rule's efficiency goal. When the initial defendant brings his suit in the same federal court as the initial plaintiff, the court can achieve the goals of Rule 13(a) by simply consolidating the two actions pursuant to Rule 42(a).[27]

In *Speed Products Co. v. Tinnerman Products, Inc.*[28] the court affirmed the district court's decision to consolidate two related suits, rather than dismissing the later-filed claim which should have been asserted as a compulsory counterclaim in the prior suit. Speed sued Tinnerman in federal court and Tinnerman counterclaimed. After the initial decision in that action was reversed, and when a remand was pending, Speed brought a separate action—based on a claim that arose out of the same transaction as Tinnerman's counterclaim in the first suit—in the same federal district court. The district court then consolidated the two actions pursuant to Rule 42(a). On appeal, the court observed that "under Rule 13(a) . . . the claim of Speed's second action was subject-matter for a compulsory counterclaim. To avoid the bar of res judicata in a subsequent action, Speed was obliged to plead it in the first action before Tinnerman's counterclaim had been finally adjudicated."[29] The court reasoned that because Speed brought its second action during the period in which it could have amended its complaint in the first action, and because the district court consolidated the two suits, the failure to follow the Rule had no practical consequence. Accordingly, the court held that Speed's second claim was not barred.[30]

II

SECOND SUIT BROUGHT IN ANOTHER FEDERAL COURT: CONSOLIDATION OF CLAIMS BY TRANSFER OR INTERDISTRICT INJUNCTION

The more difficult case arises when the defendant in the initial

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27 Federal Rule of Civil Procedure 42(a) states:

> Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

FED. R. CIV. P. 42(a).

28 222 F.2d 61 (2d Cir. 1955).

29 *Id.* at 68 (citations omitted). Although Speed was the plaintiff, rather than the defendant, in the original action, it was nonetheless required to assert this claim as a counterclaim in the initial action. Rule 13(a) requires a plaintiff to assert any claims arising out of the same transaction or occurrence as the defendant's counterclaims because the compulsory counterclaim requirement of the Rule applies to any "pleading." *See supra* note 1.

30 222 F.2d at 68.

suit fails to assert his compulsory counterclaim and, while that suit is pending, brings an independent action on his claim in another district.[31] Because two district courts have jurisdiction over the parties, Rule 42(a)[32] is not available. As a result, "consolidation"[33] of the two actions requires judicial mechanisms that have an interdistrict effect.

A. The First-Filed Priority Rule

1. *The Basic Rule*

Most courts facing this situation rely on a general rule that the first court to obtain jurisdiction of a lawsuit has priority over any subsequent suits involving the same parties and related claims.[34] In *Crosely Corp. v. Hazeltine Corp.*,[35] the United States Court of Appeals for the Third Circuit set forth the rationale for the first-filed priority rule:

> It is of obvious importance to all the litigants to have a single determination of their controversy, rather than several decisions which if they conflict may require separate appeals to different circuit courts of appeals. No party has a vested right to have his cause tried by one judge rather than by another of equal jurisdiction. . . . The party who first brings a controversy into a court of competent jurisdiction for adjudication should, so far as our dual system permits, be free from the vexation of subsequent litigation over the same subject matter. The economic waste involved in duplicating litigation is obvious.[36]

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31 Several factors may motivate a party to file an independent action in another district, including seeking a more geographically convenient forum, a forum having judges and local rules with which the party is familiar and comfortable, a forum that the party anticipates will apply more favorable law, or even a forum which will render the opposing party's defense more difficult. For a summary of these and other motivating factors, see Vestal, *supra* note 16, at 13-15.

32 *See supra* note 27.

33 Although the term "consolidation" is often considered synonymous with "consolidation under Rule 42(a)," it can also refer, in a more general sense, to combining claims into one lawsuit. *See, e.g.*, Pumpelly v. Cook, 106 F.R.D. 238, 240 (D.D.C. 1985) ("dismissal of this action offers the most effective way to consolidate the separate aspects of this dispute"). This Note uses the term in this latter, generic sense except when explicitly referring to Rule 42(a).

34 For example, in Donaldson, Lufkin & Jenrette, Inc. v. Los Angeles County, 542 F. Supp. 1317 (S.D.N.Y. 1982), the court noted that "the accepted rule . . . is that the forum where an action is filed first is accorded priority over subsequent actions arising out of the facts giving rise to the first filed action." *Id.* at 1320. *See also* General Battery Corp. v. TSS-Seedman's, Inc., 609 F. Supp. 488, 489 (E.D. Pa. 1985) ("It is a well settled principle . . . that 'when there is more than one lawsuit involving the same parties and the same issues, pending in different courts, the court first obtaining jurisdiction of the parties and the issues should proceed with the litigation.' ") (citations omitted).

35 122 F.2d 925 (3d Cir. 1941).

36 *Id.* at 930.

Applying this rule to the compulsory counterclaim situation, many courts assume that Rule 13(a) requires that the "single lawsuit" resolving the related claims must occur in the court first obtaining jurisdiction over the parties. Thus, in *United States v. Eastport Steamship, Corp.*,[37] a case involving the Court of Claims equivalent of Rule 13(a), the court ruled that "[t]he compulsory counterclaim rule requires that once the action was commenced in the Court of Claims that court was the only proper forum for the adjudication of any [compulsory counterclaims]."[38] Similarly, in *Semmes Motors, Inc. v. Ford Motor Co.*,[39] the court noted that "the instances where the second court should go forward despite the protests of a party to the first action where full justice can be done, should be rare indeed."[40]

2. *Possible Departure From the Rule*

A number of courts, however, have argued against mechanical application of the first-filed priority rule.[41] The most notable case to question the first-filed priority rule is *Columbia Plaza Corp. v. Security National Bank*.[42] In *Columbia*, the District of Columbia Court of Appeals reversed the district court and held that the plaintiff in the court first acquiring jurisidiction was entitled to an injunction preventing the defendant from prosecuting in a later filed action.[43] The court issued the injunction, however, only after determining which of the two forums was more appropriate to hear the action.

The case came to the court of appeals in a somewhat unusual procedural posture. Columbia had first sued Security in the United States District Court for the District of Columbia. A week later, Security brought suit against Columbia in a New York state court. Columbia removed Security's action to the United States District Court for the Southern District of New York and then amended its complaint in the District of Columbia action to include a claim arising out of the same transaction as Security's now pending claim in the Southern District. Columbia next moved in the District of Columbia

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37 255 F.2d 795 (2d Cir. 1958).

38 *Id.* at 802.

39 429 F.2d 1197 (2d Cir. 1970).

40 *Id.* at 1203.

41 *See, e.g.*, Warshawsky & Co. v. Arcata Nat'l Corp., 552 F.2d 1257, 1263 (7th Cir. 1977) which stated:

> unless unusual circumstances warrant, the party filing later in time should be enjoined from further prosecution of his suit. However, . . . the question whether an injunction should or should not issue where the parties were prosecuting distinct actions in different courts was within the discretion of the district court and that any mechanical solution of such problems [is] not wise judicial administration.

42 525 F.2d 620 (D.C. Cir. 1975).

43 *Id.* at 629.

court to enjoin prosecution of the New York cause of action alleging that Security was required to assert its claim as a compulsory counterclaim in the District of Columbia action. The district court denied the motion on the grounds that the New York action was commenced first.[44] The court of appeals reversed, ruling that Rule 15(c)[45] operated to relate back Columbia's amended complaint to the original filing date so that "the District of Columbia was the first jurisdiction in which the issues . . . were raised."[46]

The court of appeals acknowledged a "general rule that the court first acquiring jurisdiction of a controversy should enjoin subsequent proceedings thereon in other jurisdictions,"[47] but went on to state: "In our view, however, choice of the forum cannot be suitably made by mechanical application of that principle. The opinions recognizing the rule have frequently contained a caveat that it should be ignored under some circumstances."[48] Having rejected the mechanical solution, the court examined "equitable factors"[49] to determine whether to grant the injunction. The court, however, did not clearly indicate whether it rejected the first-filed priority rule entirely or whether it simply recognized the possibility of exceptions to the rule. If the court intended to abandon the first-filed priority rule completely, then it would analyze the "equitable factors," without any preference for the initial court acquiring jurisdiction, to determine which of the two courts provided the more convenient and just forum.[50] On the other hand, if the court intended to adopt a "first-filed priority with exceptions" approach, the court would analyze the "equitable factors" to determine whether they provided grounds for an exception to the rule in this particular case.

3. *The First Court Decides Rule*

Whether courts determine the proper forum by a balancing of equities test or by the "first-filed priority with exceptions" approach, the question remains as to which of the two courts having jurisdiction over the parties should make this determination. In *Donaldson, Lufkin & Jenrette, Inc. v. Los Angeles County*,[51] the court rec-

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44 *Id.* at 626.

45 Federal Rule of Civil Procedure 15(c) states, in part: "Relation Back of Amendments. Whenever the claim or defense asserted in the 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. . . ." FED. R. CIV. P. 15(c).

46 525 F.2d at 626.

47 *Id.* at 627.

48 *Id.*

49 *Id.* at 628. For a discussion of these factors, see *infra* text accompanying note 94.

50 *See infra* note 87-107 and accompanying text.

51 542 F. Supp. 1317 (S.D.N.Y. 1982).

ognized the importance of this question. In that case, Los Angeles ("LA") had sued Donaldson, Lufkin & Jenrette ("DLJ") in the United States District Court for the Central District of California. DLJ then brought this action, arising out of the same transaction as LA's California action, in the Southern District of New York. DLJ moved in the Southern District Court to enjoin LA from prosecuting the California action.[52] The Southern District court observed that in the absence of "special circumstances," the first-filed priority rule should apply.[53] Without determining whether such special circumstances were presented, the court focused on the critical issue of which court should determine whether special circumstances existed.[54] Addressing this issue, the court held that the "district court hearing the first-filed action should determine whether special circumstances dictate that the first action be dismissed in favor of a later-filed action."[55] The court reasoned that such a rule is necessary to avoid "inconsistent rulings on discretionary matters as well as duplication of judicial effort" and the "possible chaos resulting from conflicting decisions."[56]

B. Methods of Consolidating the Two Suits

When a defendant in a federal suit brings an independent suit in another federal court on a claim that is subject to Rule 13(a) in the first suit, the opportunity for the two courts to consolidate the related disputes can arise in a number of ways. The initial plaintiff can move in the first court for an injunction preventing further prosecution of the second suit or he can move in the second court for a dismissal. The initial defendant can move in the second court to enjoin prosecution of the initial suit or he can more in the first court for dismissal. Finally, either party can move, in either court, for the court to transfer the suit before it to the other district court.

1. *First Court Enjoins Second Action*

To avoid duplicative litigation the court with jurisdiction over the initial action usually enjoins the prosecution of the later-filed action.[57] In *National Equipment Rental, Ltd. v. Fowler*,[58] the court of

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52 *Id.* at 1319.

53 *Id.* at 1320.

54 *Id.*

55 *Id.* at 1321.

56 *Id.* (citing the trial transcript). For a summary of a "classic example of one court ordering proceedings stayed in another court while that very court refused to abate the same pending action," see Vestal, *supra* note 16, at 22.

57 For a summary of cases discussing the considerations controlling whether to grant or deny an injunction enjoining prosecution of another action, see Annotation, *Propriety of Injunction By Federal Court in Civil Action Restraining Prosecution of Later Civil Action*

appeals affirmed the district court's order enjoining prosecution in another district.[59] National had brought suit against Fowler and Thomas in the Eastern District of New York. Prior to trial in that action, Thomas sued National in the Northern District of Alabama on a claim concerning the same lease agreement as National's claim. In the Alabama court, National moved to dismiss or, in the alternative, to transfer the action to the Eastern District of New York. When the Alabama court denied these motions, National then moved in the New York court to enjoin Thomas from further prosecution of the Alabama action and to have that action transferred to the New York court. The district court in New York granted both motions.[60]

On appeal, the court affirmed the district court's issuance of an injunction but reversed the portion of the district court's order directing that the Alabama case be transferred to the Eastern District of New York. The court of appeals held first that "the situation was a perfect one for the issuance of the injunction. . . ."[61] In support of this conclusion, the court stated:

> The bulk of authority supports the position that when a case is brought in one federal district court, and the case so brought embraces essentially the same transactions as those in a case pending in another federal district court, the latter court may enjoin the suitor in the more recently commenced case from taking any further action in the prosecution of that case.[62]

Declaring that "the first court to obtain jurisdiction of the parties and of the issues should have priority over a second court to do so," the court viewed the issuance of the injunction as an appropriate method of protecting the initial court's jurisdiction.[63] The court next held that the injunction made transfer unnecessary, because it effectively consolidated the two claims. Once the court enjoined Thomas from pursuing his claim in the Alabama court, that claim would either be precluded under Rule 13(a) or the New York court could grant Thomas leave to amend his answer and include the claim pursuant to Rule 13(f).[64]

In Another Federal Court Where One or More Parties or Issues Are, or Allegedly Are, Same, 42 A.L.R. FED. 592 (1979).

58 287 F.2d 43 (2d Cir. 1961).

59 *Id.* at 45. *See also* United Fruit Co. v. Standard Fruit and S.S., 282 F. Supp. 338 (D. Mass. 1968) (granting plaintiff's motion to enjoin defendant from further prosecution of suit brought in another district on claim that arose out of same transaction as plaintiff's claim).

60 287 F.2d at 44.

61 *Id.* at 46.

62 *Id.* at 45.

63 *Id.*

64 *Id.* at 46. Federal Rule of Civil Procedure 13(f) states: "Omitted Counterclaim.

2. *Second Court Dismisses or Stays Action Before it*

Consolidation of two related claims may also be achieved if the court with jurisdiction over the second-filed action either stays its own proceedings or dismisses the action before it. For example, in *Semmes Motor, Inc. v. Ford Motor Co.*,[65] the court of appeals reversed the district court's decision not to stay the proceedings before it.[66] In that case, Semmes had sued Ford in a New Jersey state court and Ford had removed the case to the United States District Court for the District of New Jersey. A month later, Semmes brought a "substantially identical" claim in the United States District Court for the Southern District of New York. The next day, Ford filed a counterclaim in the New Jersey action.[67] That same day, events occurred which gave Semmes a new claim arising out of the same transaction as Ford's counterclaim. This new claim was, accordingly, a compulsory counterclaim to Ford's claim in the New Jersey action.[68] However, rather than asserting the new claim as a compulsory counterclaim in the New Jersey action, Semmes asserted it by amending its complaint in the New York action. Ford later moved in the New York court for a stay of proceedings pending determination of the New Jersey action. The New York court denied the motion.[69]

On appeal, the Second Circuit held that the "court below went beyond the allowable bounds of discretion when it refused to grant Ford's motion for a stay. . . ."[70] The court first stated that under the circumstances, "the New Jersey court could properly have enjoined prosecution of the New York action if Ford had sought [an injunction], and might even have been bound to do so."[71] The court then reasoned that the end result should be the same when "the party seeking to preserve the primacy of the first court moves the second court to stay its hand rather than asking the first court to enjoin prosecution of the second case."[72] Accordingly, the court ruled that the New York court should enter a stay, provided that Semmes be

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When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment." FED. R. CIV. P. 13(f).

65 429 F.2d 1197 (2d Cir. 1970).

66 *Id.* at 1204.

67 *Id.* at 1200.

68 *Id.* at 1202. *See supra* note 29.

69 429 F.2d at 1201.

70 *Id.* at 1204.

71 *Id.* at 1202. The court's assertion that the New Jersey court might have been bound upon a proper motion by Ford to enjoin the prosecution of the New York action reflects a view that courts should strictly adhere to the first-filed priority rule. *See supra* notes 37-40 and accompanying text.

72 429 F.2d at 1202.

allowed leave to file its claim as a compulsory counterclaim in the New Jersey action.[73]

The second court obtaining jurisdiction over the parties can also consolidate the two actions simply by dismissing the second suit. In *E.J. Korvette Co. v. Parker Pen Co.*[74] the court held that Rule 13(a) requires a dismissal of the second suit where the plaintiff's claim in that suit is the subject of a compulsory counterclaim in a pending federal action. The court stated that "[s]ince the present complaint should have been pleaded in the defendant's prior action against the plaintiffs it must be dismissed, but with leave to them, if so advised, to assert counterclaims in that action within 30 days after the entry of an order."[75]

Whether the second court orders a stay or a dismissal, it denies the plaintiff in the second action the opportunity to go forward in that court. Both solutions accord the first court priority, in effect telling the plaintiff in the second action to bring his claim as a compulsory counterclaim in the first action. The difference between these two methods of consolidation is that where the court orders a stay pending resolution of the initial suit, rather than dismissal, proceedings in the second suit may resume if the first suit never reaches judgment.[76]

3. *Second Court Enjoins Prosecution of First Action*

Notwithstanding the often rigid application of the first-filed priority rule,[77] the goal of avoiding duplicative litigation does not necessarily require consolidation of the claims in the initial court. The efficiency concerns of Rule 13(a) can equally be advanced by consolidation of the two actions in the second court.

In *Sentry Corp. v. Conal International Corp.*,[78] the court granted an injunction enjoining a previously filed suit. The Netherlands Trading Society ("Netherlands") had sued Sentry Corp. ("Sentry") in Philadelphia County Court. Two days later, Sentry brought this action in the Southern District of New York, against Netherlands and others, on a claim arising out of the same transaction as Nether-

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73 *Id.* at 1204.

74 17 F.R.D. 267 (S.D.N.Y. 1955).

75 *Id.* at 269. *See also* United States v. Eastport S.S. Corp., 255 F.2d 795, 802 (2d Cir. 1958) ("the dismissal . . . by the District Court was proper even though no judgment had previously been rendered by the Court of Claims.") discussed *supra* text accompanying notes 37-38.

76 "A stay of proceedings stops the cause for the period designated in the stay order. . . . A stay is requested to suspend an action, often because of the pendency of another proceeding." 9 C. THOMPSON & D. JAKALA, CYCLOPEDIA OF FEDERAL PROCEDURE § 28.01, at 65 (3d ed. 1985).

77 *See supra* notes 37-40, 71 and accompanying text.

78 164 F. Supp. 770 (S.D.N.Y. 1958).

lands' pending suit.[79] Three weeks later, Sentry removed the initial suit to the United States District Court for the Eastern District of Pennsylvania[80] and moved in the New York court to enjoin Netherlands from prosecuting the Pennsylvania suit. Netherlands filed a cross motion to dismiss the New York suit "because of a prior action pending between the said defendant and the plaintiff involving the same subject matter. . . ."[81]

Citing Rule 13(a), the New York court observed that "each of the pending suits could properly be asserted as . . . [a] counterclaim in the other."[82] The court then ruled that in such a situation, "the chronological sequence of the actions should be of secondary importance as compared with the balance of convenience."[83] Relying on the fact that all the parties necessary for full adjudication were before the court, and that the Eastern District of Pennsylvania might not have jurisdiction over some parties, the court concluded that the Southern District of New York was the more appropriate fornm.[84] Accordingly, the court enjoined prosecution of the Pennsylvania suit.[85]

4. *Either Court Transfers the Suit Before it to the Court Where the Related Action is Pending*

Just as the second court acquiring jurisdiction can serve the goal of consolidation of the two claims by enjoining the proceedings in the initial action, the court first obtaining jurisdiction can serve this goal by transferring the claim before it, pursuant to section 1404 of the Judicial Code, to the court where the defendant has brought suit on his related claim.[86] In *Columbia Plaza Corp. v. Security National Bank*,[87] for example, the court recognized the availability of this option. The *Columbia* case involved an appeal from the decision of the United States District Court for the District of Columbia, in which the lower court denied a motion to enjoin prosecution of the second claim filed in the Southern District of New York that alleg-

79 *Id.* at 772.

80 *Id.*

81 *Id.*

82 *Id.* at 773.

83 *Id.* at 773-74. This approach seems to illustrate a complete rejection of the first-filed priority rule as opposed to retaining the rule with exceptions. These two alternatives are discussed *supra* text accompanying note 50 and *infra* notes 97-107 and accompanying text.

84 164 F. Supp. at 774.

85 *Id.*

86 28 U.S.C. § 1404(a) (1982) states in full: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

87 525 F.2d 620 (D.C. Cir. 1975). *Columbia* is discussed *supra* notes 42-50 and accompanying text.

edly should have been asserted as a compulsory counterclaim in the District of Columbia action.[88] In reversing the district court, the court of appeals determined that the issues pertaining to the parties' related claims "were raised" in the District of Columbia action prior to being raised in the New York action.[89] Accordingly, Rule 13(a) called for "assertion of the New York cause of action as a counterclaim to the District of Columbia cause of action."[90]

This determination, however, did not necessarily mean that the District of Columbia court should have granted the injunction:

> [T]hat only one court should consider the two causes of action obviously does not ipso facto determine which court should do so. To be sure, the District of Columbia court could achieve Rule 13(a)'s single-suit objective by restraining Security from going forward in New York, as the New York court might itself have done. But the goals underlying Rule 13(a) would likewise be realized should either court transfer the cause of action pending before it to the other.[91]

Not only does the transfer option serve the goals of Rule 13(a) but it also allows the consolidated action to proceed in the forum "more convenient to the parties and to the courts, and more consonant with the overall interests of justice."[92] Thus, the court held that "mechanical application" of the "general rule that the court first acquiring jurisdiction of a controversy should enjoin subsequent proceedings thereon in other jurisdictions" would be inappropriate.[93] Instead, the decision whether to grant the injunction should turn on equitable considerations, such as the availability of third parties, the availability of witnesses, and the relative ability of each court to expeditiously handle the claim.[94] Based on these considerations, the court concluded that the District of Columbia court was the appropriate forum.[95]

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88 *Id.* at 625-26.

89 *Id.* at 626.

90 *Id.* at 626-27.

91 *Id.* at 627 (footnotes omitted). *See also* Warshawsky & Co. v. Arcata Nat'l Corp., 552 F.2d 1257 (7th Cir. 1977). After quoting the above passage from *Columbia*, the court stated:

> In sum, Rule 13(a)'s single-suit objective could have been met by confining all of the disputes in either the California or the Illinois court. That the Illinois court first acquired jurisdiction of the controversy, with power to enjoin subsequent proceedings in another jurisdiction, although entitled to weight, does not necessarily entail the conclusion that it was required to exercise that power.

Id. at 1263.

92 525 F.2d at 627.

93 *Id.*

94 *Id.* at 628.

95 *Id.* at 629. Accordingly, the court ordered the district court to enjoin Security

C. A Proposed Approach: Neutral-Balancing by the First Court

Although the *Columbia* case involved somewhat unusual facts,[96] such that either court could reasonably claim to have obtained jurisdiction first, the court's reasoning was not limited to that factual situation. Rather, the court's opinion seems to stand for the general proposition that, while Rule 13(a) calls for the resolution of related claims in a single lawsuit, it does not necessarily indicate that the initial court to obtain jurisdiction over one of the claims is automatically the appropriate forum for that lawsuit. Accordingly, courts should treat a motion to dismiss or to enjoin the proceedings in the other action as raising the foundational issue of which court is the appropriate forum. Without regard to which party made the motion or in which court the motion was made, the first court to obtain jurisdiction should balance the equities, as the *Columbia* court did, to determine the appropriate forum, and thereby determine whether a dismissal, injunction, or transfer is appropriate.[97]

1. *Objections to and Justifications for the Neutral-Balancing Approach*

Under the proposed neutral-balancing approach courts should resolve the question of which court is the appropriate forum by simply balancing the interests of the parties without employing any presumption in favor of the court where the action was initially brought. As a general approach, this raises several possible objections. First, the plaintiff's choice of forum is generally entitled to some weight in determining whether the court should grant a motion to transfer under 28 U.S.C. § 1404(a).[98] Moreover, a neutral-

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from prosecuting the New York action and to grant Security leave to amend its answer and include the counterclaim in question.

96 *See supra* notes 43-46 and accompanying text.

97 While a decision to transfer usually follows a motion from one of the parties, such a motion is not a prerequisite to transfer under section 1404(a). For example, in Stanley Works v. Globemaster, Inc., 400 F. Supp. 1325 (D. Mass. 1975), the court held that:

> 28 U.S.C. § 1404(a) arms district courts with the broad mandate to transfer a civil action . . . when the 'convenience of parties . . . or the interest of justice' require such a course. . . . [T]he language of the statute leaves little doubt that it allows transfer on the court's own motion any time the court determines it is convenient or just for it to do so.

Id. at 1338. *See also* Lead Indus. Ass'n v. OSHA, 610 F.2d 70, 79 n.17 (2d Cir. 1979) and cases cited therein.

98 Thus, where a defendant moves to transfer, he "must make out a strong clear case." Blue Diamond Coal Co. v. United Mine Workers, 282 F. Supp. 562, 563 (E.D. Tenn. 1968). For example, in A. Olinick & Sons v. Dempster Bros., Inc., 365 F.2d 439 (2d Cir. 1966), the court ruled that plaintiff's choice of venue is entitled to substantial consideration when a motion is made to transfer an action to another district. *Id.* at 444.

balancing approach is inconsistent with the first-filed priority rule.[99] Traditionally, the burden on the party seeking transfer taken together with the first-filed priority rule dictated a general presumption in the initial court in favor of enjoining the subsequent action and against transfer.[100]

However, there are two major justifications for departing from the general rule in the compulsory counterclaim situation. First, in this situation, there are two suits involved, so that both parties are, in effect, plaintiffs. Thus, both parties are equally entitled to "plaintiff's choice of forum." The mere fact that one party filed his claim first should not deprive the other party of his interest in selecting the forum for litigation of his claim.[101] The proposed approach ensures that both "plaintiffs' " choice of forum is given due weight in determining whether to grant a motion to dismiss, enjoin, or trans-

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But cf. Polaroid Corp. v. Casselman, 213 F. Supp. 379, 383 (S.D.N.Y. 1962) (plaintiff's choice of forum "is entitled to no weight whatever where it appears that the plaintiff was forum shopping and that the selected forum has little or no connection with the parties or the subject matter."). *See also* Annotation, *Questions as to Convenience and Justice of Transfer Under Forum Non Conveniens Provision of Judicial Code (28 U.S.C. § 1404(a))*, 1 A.L.R. FED. 15 (1969) ("A party seeking a transfer under § 1404(a) has the heavy burden of showing a clear case for transfer.") and cases cited therein.

Nonetheless, the "heavy burden" on a party seeking transfer under section 1404(a) is not as great as that which courts have traditionally imposed on a party seeking dismissal on the basis of forum non conveniens. The Supreme Court has held that 28 U.S.C. § 1404(a) was intended "to permit courts to grant transfers upon a lesser showing of inconvenience" than was required under the "old doctrine of *forum non conveniens*." Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955). The Court further explained: "This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion [of the district court] is broader." *Id.* In the leading *forum non conveniens* case, Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947), the Court summarized those "relevant factors" as including "the private interest of the litigant"; "the relative ease of access to sources of proof"; the "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses"; the "possibility of view of premises" where appropriate; and "[f]actors of public interest," including the interest "in having localized controversies decided at home" and the interest in not imposing jury duty on a "community which has no relation to the litigation." *Id.* at 508-09.

99 *See supra* notes 34-40 and accompanying text.

100 *Id.*

101 *Cf.* 6A J. MOORE, J. LUCAS & G. GROTHEER, JR., MOORE'S FEDERAL PRACTICE ¶ 57.08 [6.-1] (2d ed. 1987). Professor Moore rejects the first-filed priority rule as applied to the issue of whether an action in one federal court for a declaratory judgment should be dismissed where an action involving the same dispute is pending in another federal court:

> The accident of commencement date should not control over the more practical and realistic factors of convenience of court, witnesses, and parties; the comparative condition of the dockets and, therefore, the relative ability of the two courts to provide a quick determination of the issues; the certainty of jurisdiction. . . ."

Id. at ¶ 57.60 (footnotes omitted). Professor Moore concludes that only if after balancing the relevant interests the court is unable to determine that one action is superior to the other, the court should apply the "chronological test." *Id.* at ¶ 57.60-57.62.

fer because the balancing is neutral—without any presumption in favor of the first court.

Second, the neutral-balancing approach has the advantage of avoiding some of the chess match litigation tactics that a first-to-file-chooses approach would foster.[102] Moreover, this approach avoids the risk of pre-emptive lawsuits. A prospective defendant, anticipating a lawsuit, may file a weak claim against a possible plaintiff, solely to force the plaintiff to litigate his strong claim in the defendant's chosen forum.[103] As long as the first-filing party can frame his rather frivolous complaint in such a way that it arises out of the same transaction as the claim he anticipates from his opponent, then he can choose the court. Not only does this deprive the rightful plaintiff of his choice of forum, it produces harassing litigation for both the court and the party dragged into court to litigate his claim at a time and place not of his choosing. Thus, in a compulsory counterclaim situation, a neutral-balancing approach serves the first-filed priority rule's rationale—avoiding vexatious litigation[104]—better than the first-filed priority rule itself does.

A second possible objection to the neutral-balancing approach is that, in many cases, the first-filed action will be inherently more efficient than the second. For example, if the first action has proceeded significantly further than the second, consolidating the suits in the first court will involve the least duplication of effort, on behalf of the court and the parties. The neutral-balancing approach, however, can incorporate these considerations; the relative stage of the litigation in the two suits is a factor courts should consider in determining which forum is more appropriate.[105]

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102 *See supra* notes 9-26 and accompanying text.

103 *See, e.g.*, Donaldson, Lufkin & Jenrette, Inc. v. Los Angeles County, 542 F. Supp. 1317 (S.D.N.Y. 1982). The plaintiff in this case moved to enjoin a defendant from prosecuting in a prior filed action on the grounds that the defendant "had allegedly brought the [prior] action solely to secure a California forum in anticipation of claims it knew would be raised by [the plaintiff]. . . ." *Id.* at 1319-20. *Cf.* Factors, Etc. Inc. v. Pro Arts, Inc., 579 F.2d 215 (2d Cir. 1978). In this case, Pro Arts' suit for a declaratory judgment preceded Factors' suit for injunctive relief concerning the same dispute. The court affirmed the district court's refusal to dismiss, stay, or transfer the later-filed suit, partly on the grounds that "Pro Arts' suit for declaratory judgment was filed in apparent anticipation of Factors' . . . suit." *Id.* at 219.

104 *See supra* text accompanying note 36.

105 *Cf.* Polaroid Corp. v. Casselman, 213 F. Supp. 379 (S.D.N.Y. 1962). In declining to apply the first-filed priority rule when the defendant had sued for a declaratory judgment to resolve his liability shortly before the plaintiff's suit in another district for fraud arising from the same transactions, the court made the following observation:

> [W]eight is given not to inconsequential priority in filing time but to substantial commitment to the cause, usually pre-trial involvement for many months, by the court first acquiring jurisdiction. Obviously, a second suit in such circumstances would cause a wasteful duplication of effort. . . . Here . . . there is no commitment to this cause.

The third possible objection to the neutral-balancing approach is that only by giving one court priority over the related lawsuits can the judicial system avoid conflicting orders from different courts and the resulting chaos and havoc wreaked upon the judicial system. The first-filed decides rule, however, avoids the threat of conflicting orders.[106] Thus, under the neutral-balancing approach, the first court acquiring jurisdiction decides which is the appropriate forum, but its decision will turu on which court can provide justice in a more convenient and expeditious manner, rather than on whether "special circumstances" justify a departure from the first-filed priority rule.[107]

A fourth possible objection to the proposed approach is the argument that such an approach will encourage defendants to violate Rule 13(a). This argument would reason as follows: If a defendant files a compulsory counterclaim pursuant to Rule 13(a) in the court where the initial claim was filed against him, and then moves in that court to have the entire action transferred under 28 U.S.C. § 1404, he will have the burden of showing a clear case in order to overcome the presumption in favor of plaintiff's choice of forum.[108] On the other hand, if the defendant fails to assert his counterclaim in the initial court, and instead brings a separate action on the claim in another court, the neutral-balancing approach would apply. Under this approach, the initial defendant could obtain a transfer of the initial action (to the second court), simply by showing that the balance of the equities favors the second forum.[109] Thus, the argument would conclude, the neutral balancing approach provides an incentive to evade the Rule.

Resolving this apparent difficulty, however, does not require maintaining the first-filed priority rule in the compulsory counterclaim situation. Instead, the problem can best be solved by applying the neutral-balancing approach in all compulsory counterclaim situations, whether the defendant complies with Rule 13(a) and files his counterclaim in the initial federal court or he fails to follow the Rule and brings his claim in a second federal court. Under such an approach, whenever a defendant properly files a compulsory counterclaim pursuant to Rule 13(a), and then moves to transfer the entire action, the court should apply the neutral-balancing approach in deciding on the transfer motion. The same considerations that justify this approach where the two claims are pending in separate courts

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Id. at 381.

106 *See, e.g.*, Donaldson, Lufkin & Jenrette, Inc. v. Los Angeles County, 542 F. Supp. 1317 (S.D.N.Y. 1982). This case is discussed *supra* text accompanying notes 51-55.

107 *See supra* text accompanying note 53.

108 *See supra* note 98 and accompanying text.

109 *See supra* note 97 and accompanying text.

apply here. In both situations, both parties have affirmative claims, and, therefore, both are equally entitled to "plaintiff's choice of forum."[110]

2. *An Illustration of the Neutral-Balancing Approach*

By rejecting the first-filed priority rule in its traditional form, and adopting neutral-balancing with a first-filed decides rule, the federal courts can adopt a consistent and manageable approach to the situation of related claims pending in different districts, where one of the claims is subject to Rule 13(a). The following model illustrates how such an approach would work.

In Action 1, A sues B in X Federal District Court. In action 2, B sues A in Y Federal District Court. Both claims arise out of the same transaction or occurrence. B brings his claim while Action I is pending. X court is the first court to obtain jurisdiction over the parties.

First, if A moves in X court to enjoin B from prosecuting Action 2, X court should balance several factors to determine which court should hear the two claims. Factors should include convenience to the parties, availability of witnesses to each court, which court would apply the more appropriate law in light of where the transaction took place and where the parties reside,[111] and whether one of the

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110 *See supra* note 101 and accompanying text.

111 A federal court sitting in diversity must apply the conflict of laws doctrine of the state in which it sits. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). Accordingly, two district courts will not necessarily apply the same substantive law. Where the initial court consolidates the two actions by transferring the action before it to the second court, the choice of law issue becomes even more complicated. The Supreme Court has held that, as a general rule, when a court transfers an action under section 1404(a), the law that would have governed in the transferor court (X court) should govern the transferred action in the transferee court (Y court). Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) ("A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms."). Applying this rule to the compulsory counterclaim situation, however, would largely defeat the purpose of Rule 13(a) because transferee law would apply to the action that was commenced in the transferee court (action 2), while transferor law would apply to the transferred action (action 1). This result would be essentially the same as hearing the two actions in two courthouses. Under these circumstances, an exception to the *Van Dusen* rule is clearly appropriate, if not necessary. The *Van Dusen* opinion itself lends support for such an exception:

> [W]e do not and need not consider whether in all cases § 1404(a) would require the application of the law of the transferor, as opposed to the transferee, State. We do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) or if it was contended that the transferor state would simply have dismissed the action on the ground of *forum non conveniens*.

Id. at 639-40 (footnotes omitted). *Cf.* Lewis v. Capital Mortgage Inv., 78 F.R.D. 295, 312 (D. Md. 1977) ("Although it is generally true that a change of venue under 28 U.S.C. § 1404(a) does not change any applicable substantive state law, where as here, the forum state has articulated a strong public policy, conflicts law principles dictate that the court apply the forum state's law.").

parties had a better claim to the choice of forum, given the nature of the two claims and the parties.[112] That X court obtained jurisdiction first should not be a factor in determining which is the appropriate court.[113]

If the balance tips to X court, then X court should enjoin B from prosecuting Action 2 and allow B leave to amend his answer in Action 1 to include his counterclaim under Rule 13(f).[114] If the balance tips to Y court, then X court should deny the motion, and transfer the case to Y court pursuant to 28 U.S.C. § 1404(a).[115] Y court should then consolidate Actions 1 and 2 pursuant to Rule 42(a).[116] If transfer under section 1404 is unavailable,[117] then X court should dismiss the action before it on condition that A is able to assert his claim as a counterclaim in Action 2. Y court should allow A leave to amend his answer to Action 2, if necessary.

Second, if A moves in Y court to stay the proceedings, to dismiss, or to transfer on the ground that B's claim is a compulsory counterclaim in Action 1, then Y court should stay the action on condition that A move for an injunction in X court to enjoin prosecution of Action 2. X court will then do the balancing outlined above. If X court determines that it is the proper forum, then Y court should dismiss on condition that B is given leave to amend in X court to assert his compulsory counterclaim.

Third, if A lets the two actions go forward, then B can move in X court for transfer or dismissal. X court should again do the neutral-balancing of considerations to determine the appropriate court.

Fourth, and finally, if both parties simply allow the two actions to go forward, the courts may have no knowledge of the other pending action and, therefore, may be unable to avoid the duplicative litigation. If, however, the courts are aware of the other pending action, then X court can raise the Rule 13(a) issue itself and perform the neutral-balancing to determine the appropriate forum. If X court determines that Y court is the appropriate forum, then it

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112 *See supra* note 103 and accompanying text.

113 *See supra* notes 101-04 and accompanying text.

114 *See supra* note 64.

115 *See supra* note 86.

116 *See supra* note 27.

117 28 U.S.C. § 1404(a) allows a district court to transfer an action to "any other district or division where it might have been brought." The Supreme Court has held that this language requires that the transferee court would have satisfied the requirements of venue and territorial jurisdiction, as to the defendant, at the time the action was brought, not at the time of the transfer motion. Hoffman v. Blaski, 363 U.S. 335 (1960). Thus, if territorial jurisdiction over B or venue as to B would have been improper in Y court, at the time A brought suit in X court, then transfer may not be available. *See* Vestal, *supra* note 16, at 23 (transfer as a means of consolidating related actions is limited by Hoffman v. Blaski).

should transfer the suit to Y court[118] or, if transfer is unavailable, dismiss the suit.[119] If X court determines that it is the appropriate forum, an injunction against the proceedings in Y court, without a request for such relief by either party, would be contrary to the nature of the adversary system, and therefore inappropriate. However, Y court could still dismiss the action before it and force the whole action into X court.

The neutral-balancing approach consolidates the related claims into a single litigation, without unduly sacrificing the ability of the parties to choose a reasonable time and place in which to litigate an affirmative claim.[120] As a result, the approach promotes Rule 13(a)'s efficiency and fairness goals.[121] The first court to acquire jurisdiction over the parties retains its priority insofar as it does the balancing test. This first-filed decides rule avoids the concern of two district courts issuing conflicting orders.[122] Furthermore, by determining the appropriate forum based on a neutral-balancing of interests, this approach avoids the incentives for races to litigation,[123] and provides a rational and just method for determining the appropriate forum to hear the consolidated lawsuit.[124]

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118 Section 1404(a) permits a court to transfer without a motion from a party. *See supra* note 97.

119 A federal court has broad discretion in controlling the proceedings in cases before it:

> All courts, federal and state, have a broad and inherent power 'over their own process, to prevent abuses, oppression, and injustice'. . . . Within this power, is the power of a federal district court, in the exercise of a sound discretion: to stay an action pending before it; to order a pre-trial consolidation of actions pending before it . . . ; and *to give effective relief in related situations.*

1 MOORE'S FEDERAL PRACTICE *supra* note 101, at 0.60[6], at 638 (footnotes omitted) (emphasis added). *See also* O'Connell v. Mason, 132 F. 245, 247 (1st Cir. 1904) ("Unquestionably, the power to dismiss exists quite independent of express statutory authority, and may be exercised in a proper case by the court upon its own motion."). *Cf.* Landis v. North Am. Co., 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings [in one action to abide the outcome of another] is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

120 Choice of time is limited, because once either party commences suit, both parties' claims must commence. Under the proposed approach, however, this choice is impaired less than where the parties are forced to race to the courthouse. *See supra* note 103; *see also supra* note 22 and accompanying text.

121 *See supra* note 25.

122 *See supra* note 56 and accompanying text.

123 *See supra* text accompanying note 102.

124 *See supra* note 101. *See also* Polaroid Corp. v. Casselman, 213 F. Supp. 379 (S.D.N.Y. 1962). In the course of denying the plaintiff's motion to enjoin a later-filed action in another district, and granting the defendant's motion to transfer to that district, the court stated, "There can be no doubt . . . that in deciding whether or not to enjoin an action in another forum, a court of equity should prefer the forum which offers effective, convenient, inexpensive, and prompt relief. . . . The same criteria govern the decision of whether to transfer the cause under Section 1404(a)." *Id.* at 382.

III
SECOND ACTION BROUGHT IN STATE COURT

A defendant in a federal court action with a compulsory counterclaim against a plaintiff may also attempt to evade Rule 13(a) by bringing the claim in state court. If the state court renders a judgment before the federal court does, then the federal defendant will have sucessfully avoided the Rule. Indeed, the state court judgment will probably resolve the pending federal suit through issue preclusion.[125] Similarly, if the federal court reaches judgment first, it will resolve the state court action. But whichever court ultimately renders a judgment, the contemporaneous lawsuits represent the very problem Rule 13(a) was designed to eliminate: duplicative litigation.[126]

When a defendant in a federal action brings a claim in state court that should have been brought as a compulsory counterclaim in the federal action the problem of consolidating the claims is more difficult than when the claims are pending in two federal district courts for two reasons. First, neither court can transfer the action

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125 *See supra* note 19.

126 *See supra* notes 5-8 and accompanying text. This problem will only arise, however, when the state court defendant is unable to remove the case to federal court under 28 U.S.C. § 1441 and then consolidate the two suits following the method outlined in Part II. Section 1441(a) states:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (1982). However, section 1441(b) limits removal of diversity actions to actions brought against a defendant who is not a citizen of the forum state:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be subject to removal without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441(b) (1982).

Thus, if federal question jurisdiction exists for the state court suit, or if the plaintiff sues in a state in which the defendant is not a citizen, the defendant may remove the action to federal court. The suits can then be consolidated in one of the federal courts. *See, e.g.*, C. WRIGHT & A. MILLER, *supra* note 4, § 1418, at 105 ("These same general principles of transfer, stay, and consolidation also apply when one or both of the actions before the federal courts were removed from state courts."). *See also* Columbia Plaza Corp. v. Security Nat'l Bank, 525 F.2d 620, 629 n.64 (D.C. Cir. 1975) (fact that previously-filed suit, pending in another district court, was removed from state court does not affect district court's power to enjoin proceedings in that suit).

Where, however, there is only diversity jurisdiction for the suit, and it is brought in a state in which the defendant has citizenship, removal is not available, and consolidating the suits will have to involve both the federal and the state courts.

pursuant to 28 U.S.C. § 1404.[127] Second, 28 U.S.C. § 2283 generally prohibits the federal courts from enjoining proceedings in a state court.[128]

As an alternative to the federal court enjoining the state suit, the state court might enjoin the suit pending in federal court. While Rule 13(a) itself clearly would not prompt a state court to enjoin a federal suit, a similar state court rule, or the "general policy in both state and federal courts against multiplicity of litigation,"[129] might justify an injunction. The Supreme Court, however, has made clear that a state court's power to enjoin federal proceedings is even more limited than a federal court's power to enjoin state proceedings.[130]

A. The Prohibition Against a Federal Court Enjoining Proceedings in a State Court

Although section 2283 allows a federal court to enjoin state court proceedings if "expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments,"[131] the courts have held that none of these exceptions applies to the Rule 13(a) situation.

In *Reines Distributors, Inc. v. Admiral Corp.*,[132] Reines sued Admiral in federal court. Thereafter, Admiral brought related claims against Reines in New York state court and also asserted these claims as compulsory counterclaims in the federal court. Reines moved in the state court for a stay, and the state court denied the motion. Reines then moved in the federal court for an order enjoining Admiral from further prosecuting the state court action. Relying on section 2283, the federal court denied the motion.[133] The

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127 Section 1404 provides only for interdistrict transfer (i.e., between two federal district courts). *See supra* note 86. There is no comparable provision for transfer between judicial systems.

128 28 U.S.C. § 2283 provides: "Stay of State court proceedings. A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1982).

129 C. WRIGHT & A. MILLER, *supra* note 4, § 1418, at 108.

130 *See* Donovan v. Dallas, 377 U.S. 408, 413 (1964) ("state courts are completely without power to restrain federal-court proceedings in *in personam* actions").

131 28 U.S.C. § 2283 (1982).

132 182 F. Supp. 226 (S.D.N.Y. 1960).

133 *Id.* at 231. The result may be different, however, where the second action is brought in a court of a foreign country. In Seattle Totems Hockey Club, Inc. v. Nat'l Hockey Leagne, 652 F.2d 852 (9th Cir. 1981), the defendant brought suit in a Canadian court on a claim that was a compulsory counterclaim in the federal action. Affirming the district court's injunction restraining the defendant from prosecuting in the Canadian court, the court noted that "[i]t is well-settled that in order to enforce . . . [Rule 13(a)], a federal court may enjoin a party from bringing its compulsory counterclaim in a subsequent *federal* court action." *Id.* at 854 (emphasis in original). Furthermore, "[a] federal . . . court with jurisdiction over the parties has the power to enjoin them from proceed-

court held that none of the exceptions to section 2283 applied to this situation.[134] Citing the reviser's notes to the Act, the court ruled that the "in aid of its jurisdiction" exception simply made "clear the recognized power of the federal court to stay proceedings in state courts in cases removed to the district courts."[135] The "protect or effectuate its judgments" exception operated only to allow courts to "prevent a party from relitigating in the state court issues already foreclosed by a federal judgment."[136] The court further reasoned that where the state court has concurrent jurisdiction over the claims, "the fact that such [compulsory] counterclaims must be pleaded cannot oust the state court of jurisdiction."[137] As to whether Rule 13(a) amounted to an express authorization to enjoin state courts, the court held that "the words 'expressly authorized by Act of Congress' could not encompass the directive contained in the compulsory counterclaim rule."[138] Moreover, the court viewed Rule 13(a) as "simply a federal court housekeeping rule to expedite the courts' business," which "could not possibly qualify as an exception" to section 2283.[139]

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ing with an action in the courts of a foreign country. . . ." *Id.* at 855. *See also* Note, *The Power of a Federal District Court to Enjoin An Action, Grounded on a Compulsory Counterclaim, in the Court of a Foreign Country*, 2 CANADIAN-AM. L.J. 211 (1984).

134 182 F. Supp. at 228.

135 *Id.*

136 *Id.* at 228-29. This "protect and effectuate its judgments" exception may allow a federal court to enjoin a party from prosecuting in a state court a claim that should have been asserted as a compulsory counterclaim in a federal action that has already reached judgment. *See, e.g.*, Brown v. McCormick, 608 F.2d 410 (10th Cir. 1979) (affirming district court's injunction against suit in state court involving a compulsory counterclaim to a federal suit that had already reached judgment).

137 182 F. Supp. at 229.

138 *Id.*

139 *Id.* at 230. *See also* Fantecchi v. Gross, 158 F. Supp. 684 (E.D. Pa. 1957), *appeal dismissed*, 255 F.2d 299 (3d Cir. 1958). In that case, the court denied plaintiff's motion to stay defendant's state court action which arose out of the same transaction as plaintiff's claim in the federal action. The court stated:

> [I]nsofar as the effect of a party's failure to plead a compulsory counterclaim under said Rule in a Federal action is concerned the Congressional intent is clear—said party is thereafter barred from pleading same. . . . However, insofar as the effect of such failure on a State court action is concerned the Congressional intent is not so clear; thus, in the absence of clearer expression than is contained in Rule 13(a) we are unwilling to say that Congress . . . intended to grant Federal Courts the authority to enjoin State Court actions . . . .

Id. at 687. *See also* Red Top Trucking Corp. v. Seaboard Freight Lines, Inc., 35 F. Supp. 740 (S.D.N.Y. 1940) (Rule 13(a) does not provide federal court with authority to enjoin state court proceedings); C. WRIGHT & A. MILLER, *supra* note 4, § 1418, at 106 ("Clearly the language of Rule 13(a) cannot be construed as empowering the federal court to restrain state court proceedings. . . . In this situation the general objective underlying Rule 13(a) of avoiding multiple suits is outweighed by the express statutory policy prohibiting federal interference with the functioning of state judicial system.") (footnotes omitted).

B. The Federal Defendant's Interest in Access to a State Court

Because Rule 13(a) does not govern state courts, a state court may choose to adjudicate a party's claim, despite the fact that the claim is the subject of a compulsory counterclaim in a pending federal action. For example, in *M.C. Manufacturing Co., Inc. v. Texas Foundries, Inc.*,[140] a Texas court ruled that because Rule 13(a) does not empower a federal court to enjoin a state court action, a state court should not abate its own proceedings when faced with a claim that is the proper subject of a compulsory counterclaim in a pending federal suit. M.C. Manufacturing had sued Texas Foundries in federal court. While that action was pending, Texas Foundries filed suit against M.C. Manufacturing in a Texas state court. The state court defendant, M.C. Manufacturing, sought abatement of the state court action on the ground that Texas Foundries' claim was a compulsory counterclaim in the pending federal action.[141] On appeal from a state court judgment for Texas Foundries, the court affirmed the trial court's denial of the plea. In reaching this conclusion, the court stated:

> We have not . . . found a case directly in point. Apparently, the approach taken in other cases was to attempt to secure an order enjoining the prosecution of the state court case, rather than a [request for abatement]. However, we see no reason why the same rules should not be applied to both types of cases.[142]

The *M.C. Manufacturing Co.* court rested its decision solely on the fact that the federal court with jurisdiction over the parties lacked the power to enjoin the state court. The court's rationale—ensuring that the same rule applies regardless of which court the state court defendant seeks relief from—seems insufficient to justify ignoring the policies of Rule 13(a). Nonetheless, allowing the state court action to go forward despite the presence of a related action pending in federal court may serve broader policy interests.

For example, the state court, as part of an independent judicial system of general jurisdiction, may have an interest in providing liti-

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140 519 S.W.2d 269 (Tex. Civ. App. 1975).

141 *Id.* at 270.

142 *Id. But see* McDonald's Corp. v. Levine, 108 Ill. App. 3d 732, 439 N.E.2d 475 (1982). In holding that Rule 13(a) does apply to a claim brought in a state court that should have been asserted as a compulsory counterclaim in a pending federal action, the court observed:

> It has been held that a Federal court may not enjoin prosecution in a State court of what should have been a compulsory counterclaim in a pending Federal action, but this is because of the general reluctance of Federal courts to enjoin State actions. These cases do not suggest that the States are free to disregard the failure of the pleader to put forward his Federal counterclaim.

Id. at 747, 439 N.E.2d at 485. *See also infra* note 144 and accompanying text.

gants with equal access to its courts. Thus, in *Dixie Ohio Express Co. v. Eagle Express Co.*,[143] a Kentucky court decided not to enforce Rule 13(a) on the theory that the parties had a right to sue in either state or federal court. Eagle had sued Dixie in federal court. While that action was pending, Dixie brought a claim in Kentucky state court arising out of the same transaction as Eagle's claim. Despite the fact that Kentucky's "Civil Rule 13.01 [was] identical with and expresse[d] the same policy as the Federal Rule," the court held that "Dixie was not barred from suing . . . in the Kentucky courts by the mere fact that there was an action pending in the federal court in which, under the Federal Rules, Dixie's claim should have been asserted as a counterclaim."[144] The court's decision rested on notions of federalism, such as the interest in allowing claimants to choose a state forum rather than a federal forum. Relying on the "accepted rule . . . that a person may bring actions in both a federal and a state court on the same claim," the court declared that because "a *plaintiff* may sue in both courts on this claim . . . a *defendant* [should not] be restricted on his claim . . . in the action first brought against him."[145]

C. Advancing Rule 13(a)'s Policy On Grounds of Comity

Although the state courts are not bound by Rule 13(a), state courts sometimes recognize the Rule and cooperate so as to achieve the goal of efficient resolution of related claims. As the court in *Reines Distributors, Inc. v. Admiral Corp.*[146] noted, despite its decision to deny an injunction against a state court proceedings, "[t]he state courts are free to recognize the federal policy and grant a stay on the basis of comity."[147]

The South Carolina Supreme Court did just that in *Sparrow v. Nerzig*.[148] In holding that the state court should stay the proceedings before it, the court stated that the "assumption of jurisdiction by our court of a cause of action essentially the subject of a compul-

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143 346 S.W.2d 30 (Ky. Ct. App. 1961).

144 *Id.* at 33.

145 *Id.* (emphasis in original). *See also* Hubbs v. Nichols, 201 Tenn. 304, 298 S.W.2d 801 (1956) (failure to assert a compulsory counterclaim in pending federal action does not preclude a state court from hearing that claim).

146 182 F. Supp. 226 (S.D.N.Y. 1960).

147 *Id.* at 230. *See also* C. WRIGHT & A. MILLER, *supra* note 4, § 1418, at 108:

> Despite the fact that the federal court may not enjoin a state proceeding based on a federal compulsory counterclaim, the state court, although it is not required to do so, may well stay its proceedings on its own in order to effectuate the general policy in both state and federal courts against multiplicity of litigation.

Id. (footnote omitted).

148 228 S.C. 277, 89 S.E.2d 718 (1955).

sory counterclaim in the pending federal action [would] unnecessarily hinder the jurisdiction of the district court and effectually defeat the purpose of [Rule 13(a)]."[149] Allowing the South Carolina court to hear the claim would therefore, conflict with the " 'spirit of reciprocal comity and mutual assistance' required for the effective operation of our two systems of courts."[150]

In *Conrad v. West*,[151] a California appellate court took the spirit of comity even further than the *Sparrow* court did. In *Conrad*, the plaintiff brought his state action while the defendant had a claim against him pending in federal court. The state court defendant moved to stay the proceedings pending resolution of the federal action. The state court granted the motion, reasoning that the plaintiff "could have filed [his claim as] a counterclaim in the federal court action . . ." and the federal court would then have had jurisdiction over the claim.[152] Furthermore, the court observed that, as a general rule, the first court obtaining jurisdiction holds it to the exclusion of all other courts.[153] Although the two claims arose out of same transaction,[154] the court's holding seems equally applicable to permissive counterclaims.[155] Because the federal rules allow a defendant to assert any claim against an opposing party, the reasoning in *Conrad* suggests that the Texas court would stay proceedings before it any time another lawsuit between the same parties is pending in a federal district court that could obtain jurisdiction over the action brought in the state court.

D. A Proposed Approach

Resolving the problem that arises when the federal court de-

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149 *Id.* at 287, 89 S.E.2d at 722.

150 *Id. See also* McDonald's Corp. v. Levine, 108 Ill. App. 3d 732, 439 N.E.2d 475 (1982), in which the court held that the federal "compulsory counterclaim rule is applicable even though state law has no such requirement." *Id.* at 746, 439 N.E.2d at 487. *Cf.* Chapman v. Aetna Fin. Co., 615 F.2d 361, 363-64 (5th Cir. 1980) (holding that while "Georgia's compulsory counterclaim rule . . . would not ordinarily be entitled to full faith and credit in foreign jurisdictions," the rule should apply in federal court "as a matter of comity."). *See also* Dumbauld, *Judicial Interference with Litigation in Other Courts*, 74 DICK. L. REV. 369, 383 (1970) ("[T]he mere existence of a dual system of courts imposes a certain circumspection on the actions of both sets of courts in order to avoid unseemly friction, and to ensure the effective functioning of both sets of courts.").

151 98 Cal. App. 2d 116, 219 P.2d 477 (1950).

152 *Id.* at 118, 219 P.2d at 478.

153 *Id. Cf.* the discussion of the first-filed priority rule *supra* notes 34-40 and accompanying text.

154 98 Cal. App.2d at 117, 219 P.2d at 478.

155 A defendant to a federal action may assert in that action any non-compulsory counterclaims against the plaintiff under Rule 13(b). The Rule states: "Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." FED. R. CIV. P. 13(b).

fendant brings suit on his compulsory counterclaim in a state court requires consideration of the appropriate courses for both the state and the federal court. The federal court could consolidate the related actions by abating the action pending in its court and allowing the entire action to go forward in the state court. Unlike the situation where both cases are pending in federal courts, however, such an action would deprive the initial plaintiff of his right to bring his claim in a federal court.[156] The interest in providing a federal forum would seem to outweigh the Rule 13(a) concerns. As a result, where one of the two related suits is pending in state court, unlike where they are both pending in federal court, the two suits will not always be consolidated.

The sharp contrast between the approach of the *Dixie* and *M.C. Manufacturing Co.* courts[157] and that of the *Sparrow* and *Conrad* courts[158] reveals that, as in the exclusively federal court situation, there are competing interests involved in a decision to stay or dismiss the state court action. The interest in providing litigants with access to a state court[159] suggests allowing the state action to go forward. On the other hand, the federal court's interest in avoiding duplicative litigation and the associated problems[160] suggests abat-

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156 Chief Justice Marshall's often quoted statement presents a rationale for such a right:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of the United States v. Deveaux, 9 U.S. 61, 87 (5 Cranch 1809). *See also* Donovan v. Dallas, 377 U.S. 408 (1964), where, in holding that the "state courts are completely without power to restrain federal-court proceedings in *in personam* actions," the Court observed that parties "properly in the federal court ha[ve] a right granted by Congress to have the court decide the issues they present[]. . . . That right was granted by Congress and cannot be taken away by the State." *Id.* at 413; Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922) (Congressional grant of diversity jurisdiction creates "the undoubted right under the statute to invoke the jurisdiction of the federal court and that court . . . [is] bound to take the case and proceed to judgment. It . . . [can] not abdicate its authority or duty in favor of the state jurisdiction.").

157 *See supra* notes 140-45 and accompanying text.

158 *See supra* notes 148-51 and accompanying text.

159 *See supra* note 145 and accompanying text. *See also* Efros v. Nationwide Corp., 12 Ohio St. 3d 191, 465 N.E.2d 1309 (1984). In that case, the court observed that while a court could properly dismiss a suit on the basis of a prior action pending in a court of the same state, "[w]here the same action is filed in federal court and state court, entirely different policy considerations arise . . . ." *Id.* at 193, 465 N.E.2d at 1311. Accordingly, under these circumstances, dismissal was inappropriate. The important distinction, in the court's view, was that in the latter situation, "each court answers to a separate and independent sovereign." *Id.*

160 *See supra* notes 5-26 and accompanying text.

ing the state court action. But where the federal defendant brings a second suit in state court, it is the state's judicial resources, rather than federal resources, that will be expended on the duplicative litigation. Under these circumstances, Rule 13(a) seems to be of only secondary consideration.[161] Of course, the "general policy in both state and federal courts against multiplicity of litigation"[162] would still be implicated. Moreover, the presence of the two related lawsuits may create races to litigation, in which the plaintiff in each court attempts to obtain its judgment first so that he can rely on issue preclusion in defending the other suit.[163]

These considerations might suggest that the state court should use a neutral-balancing approach similar to that proposed for the exclusively federal court situation.[164] However, such an approach would be highly unfair to the federal court defendant, in light of the general rule that a plaintiff may bring suit on the same claim against the same party in both a federal and a state court.[165] As the Supreme Court has observed, "[t]he rule . . . has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded."[166] Thus, state courts commonly entertain suits despite the presence of a prior action pending in another jurisdiction concerning the same claim and the same parties.[167] Courts apparently do not view the problem of duplicative

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161 *Cf.* Reines Distribs., Inc. v. Admiral Corp., 182 F. Supp. 226, 230 (S.D.N.Y. 1960) (Rule 13(a) is "simply a federal court housekeeping rule to expedite the court's business.").

162 C. WRIGHT & A. MILLER, *supra* note 4, § 1418, at 108.

163 *See supra* note 19 and accompanying text.

164 *See supra* notes 96-124 and accompanying text.

165 *See, e.g.*, Dixie Ohio Express Co. v. Eagle Express Co., 346 S.W.2d 30, 33 (Ky. Ct. App. 1961) ("If a *plaintiff* may sue in both courts on his claim, why should a *defendant* be restricted on his claim in the action first brought against him?") (emphasis in original).

166 Kline v. Burke Constr. Co., 260 U.S. 226, 230 (1922). *See also* Princess Lida v. Thompson, 305 U.S. 456, 466 (1939) ("it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation"); 1A MOORE'S FEDERAL PRACTICE *supra* note 101, at 0.208b, at 2350 ("Where the federal and state courts have concurrent jurisdiction, as for example, in diversity and general federal question cases, actions *in personam* may proceed concurrently") (footnotes omitted).

167 *See, e.g.*, Efros v. Nationwide Corp., 12 Ohio St. 3d 191, 465 N.E.2d 1309 (1984), in which the Ohio Supreme Court held that the trial court erred in dismissing the complaint on the basis of a pending action in federal court. The court reasoned:

> The federal rule . . . provides that the pendency of a prior *in personam* action in federal court does not bar the same suit between the same parties in a state court. Applying this rule to the instant cause, we conclude that appellee's action should have been permitted to proceed to a final judgment in the . . . [state court], regardless of the pendency of the similar action in the federal district court, and regardless of which court first acquired jurisdiction. The dismissal . . . was therefore improper.

Id. at 193, 465 N.E.2d at 1311. Accordingly, the court remanded for further proceed-

litigation in this context as a sufficient concern to preclude the second suit. To adopt a contrary rule for state court suits, where the claim is a compulsory counterclaim to a suit pending in federal court, would force the federal court defendant to litigate his claim in the court chosen by the initial plaintiff. Thus, while a party can usually litigate his claim in at least two courts of his choosing, a party whose claim is subject to Rule 13(a) would be allowed to litigate his claim only in a court that he did not choose.

Accordingly, as a general rule, the independent state court action should be allowed to go forward, just as it is where the same plaintiff brings both the federal and state court actions. Instances may arise in which the state court plaintiff has chosen such an inconvenient forum, with such minimal ties to the dispute and the parties, that the state court should decide to abate its proceedings in favor of the federal proceedings. Whether such circumstances exist in a particular case should be a matter for the state court to decide, based on the significance of the particular state's interest in allowing access to its courts.

CONCLUSION

The basic purpose behind Rule 13(a)—avoiding wasteful, repetitive litigation—generally calls for the resolution of claims arising out of the same transaction or occurrence in a single lawsuit. Thus, where two such claims are simultaneously proceeding in different federal district courts, the courts should take steps to consolidate the actions, using the tools of interdistrict injunction or transfer. The courts can effectuate the Rule's efficiency concerns by consolidating the actions in either of the two courts; in this sense, Rule 13(a) is forum-neutral. Determination of the appropriate forum should turn on considerations of general efficiency and fairness to the parties, rather than on the accident of which court first obtained jurisdiction over the parties. This neutral-balancing approach advances the purposes of the Rule with the minimum encroachment on the relative interests of each party in choosing the time and place in which to litigate his claim.

Rule 13(a)'s single-suit objective is also implicated where a federal defendant brings suit on his compulsory counterclaim in a state

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ings. *Id.* *See also* Fowler v. Ross, 142 Cal. App. 3d 472, 477, 191 Cal. Rptr. 183, 186 (1983) ("Under the facts of this case, both the federal and state courts have acquired jurisdiction but neither acquires exclusive authority and each may proceed at its own pace until one or the other reaches final judgment. . . ."); Goehring v. Harleysville Mut. Casualty Co., 460 Pa. 138, 143, 331 A.2d 457, 459 (1975) ("[N]either court is divested of jurisdiction by the mere fact that another action involving the same dispute is pending in the other.").

court. In this situation, however, the competing interests in allowing access to the independent state judicial system and allowing access to a federal forum may counsel against consolidation of the actions. Nonetheless, where the party bringing the state court action does not have any legitimate interest in adjudicating his claim in the state court, rather than in the federal court, consolidation may be appropriate. Under such circumstances, the state court should, as a matter of comity, recognize the policy embodied in Rule 13(a), and dismiss the claim.

Ben Clements