1998

Original Sin and the Transaction in Federal Civil Procedure

Mary Kay Kane
UC Hastings College of the Law, kanem@uchastings.edu

Author: Mary Kay Kane

Source: Texas Law Review

Citation: 76 Tex. L. Rev. 1723 (1998).

Title: *Original Sin and the Transaction in Federal Civil Procedure*

Original Sin and the Transaction in Federal Civil Procedure

Mary Kay Kane*

Much of modern federal procedural developments liberalizing pleading, expanding jurisdiction, enlarging the scope of claims and parties allowed to be joined in a single lawsuit, and ultimately expanding the binding effect given to judgments has been accomplished through the substitution of a transaction standard for various common law or code formulations concerning these issues. Superficially, this might seem to suggest that a unified concept now underlies all of modern procedure. But, as was so eloquently stated by Professor Walter Wheeler Cook, even before the adoption of the Federal Rules of Civil Procedure:

> The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.[1]

It is true that courts do not appear to have been misled by the use of the term "transaction" in these different contexts.[2] Indeed, seldom does one find courts borrowing from one context to support the definition of a transaction in another setting.[3] Rather, the transaction standard has been

---

* Dean & Professor of Law, University of California, Hastings College of the Law. A.B. 1968, J.D. 1971, University of Michigan.

1. Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933).

2. As recognized by Professor Wright, no really serious attempts have been made to define the term "transaction," noting the general futility of all definitions. *See* Charles Alan Wright, *Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading*, 39 IOWA L. REV. 255, 270 (1954). Rather, courts have preferred to suggest tests or factors that serve as guidelines to aid in determining whether a given set of claims should or should not be joined because they satisfy the transaction standard. *See id.*

3. An exception may be in cases dealing with the joinder rules and the development of ancillary (now called supplemental) jurisdiction. But there the interplay and related purposes of the two procedural developments make such exchanges understandable, if not almost necessary. *See infra* text accompanying notes 98-101. Thus, for example, Professor Wright, in a presentation examining the 1966 amendments to the federal rules, discussed the question whether a third-party plaintiff should be able to join to an impleader claim some other claim that he might have against the third-party defendant. *See Recent Changes in the Federal Rules of Procedure, in Proceedings of the 29th Judicial Conference of the Third Circuit*, 42 F.R.D. 552 (1966) (reporting remarks of Charles Alan Wright).

applied, for the most part, consistent with the purpose of the procedure or rule for which it is the foundation.[4] Further, it is certain that Professor Charles Alan Wright, to whom this Symposium is dedicated, never would have fallen into the trap of treating the transaction standard as anything but a nuanced term designed to provide courts flexibility and some discretion in developing the policies underlying each of the areas in which it is utilized.[5] Thus, one might ask how an article exploring the development of the transaction standard contributes to the field of federal civil procedure and therefore belongs in an issue of the *Texas Law Review* celebrating the enormous contributions to the field by my esteemed colleague and friend, Professor Wright.

The difficulty is that courts most often do not articulate how the policies underlying a particular procedure or rule influence or shape their definitions of what constitutes a transaction. Explicit judicial reasoning that would ground particular applications of the transaction standard in the policies that underlie the specific issues involved would allow for better scrutiny of the propriety of the results reached. This, in turn, would help to avoid possible misinterpretations and provide better guidance to the bar about how to predict and understand whether the facts and circumstances involved in particular cases do or do not meet the requirements at issue. Failing to provide such an analysis leaves open the door for some confusion in the bar, and even more commonly, among law students who are struggling to find certainty in learning the language of the law and often are prone to Professor Cook's original sin.

He recognized that Rule 18 controlled, but offered no particular limitation or governing principle. *See id.* at 559-60. Consequently, the question was one of jurisdiction, rather than rule practice, and it should be decided by determining whether the claim of the third-party plaintiff "arises out of the very transaction which is the subject of the third-party claim," in which case jurisdiction ought to be present. *Id.* at 560-61.

4. Because courts seldom explain their applications of transactional standards by highlighting how their conclusions reflect the kind of policy analysis I am suggesting in this piece, the assertion that most decisions accurately reflect the relevant underlying policies cannot be substantiated explicitly. But this piece is not designed to challenge judicial results. Rather, it focuses on the reasoning that can justify many results reached.

5. As Professor Wright noted in an article exploring changes to the Minnesota Rules of Civil Procedure and the decision to use the concept of a transaction to control the scope of compulsory counterclaims:

> Our inquiry now must be, what is the meaning of "transaction." The literature and the case law on this word are voluminous. The United States Supreme Court has called it "a word of flexible meaning." Certainly cases can be found which say that "transaction" refers only to business negotiations, and therefore does not include torts within its orbit. The trouble is that even more authorities can be found which are precisely contrary, and, most important for our purpose, Minnesota falls in this latter class.

Charles Alan Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 591 (1952) (citations omitted).

Unfortunately, turning to a treatise—even *Federal Practice and Procedure*—will not help the struggling law student or novice lawyer because the nature of treatise writing leads to an examination of each area separately, presenting all the case law and providing a thorough analysis of the support for and interpretation of the term in each particular context.[6] Treatise writers do not commonly seek to cross area boundaries to compare how similar terms may or may not be used in similar ways in different contexts, unless doing so provides helpful precedent.[7] Nor will students find much help in consulting a dictionary. There, they would find that a transaction is "something that is transacted" or "a communicative action or activity involving two parties or two things reciprocally affecting or influencing each other."[8] Indeed, even legal dictionaries, which attempt to offer more detailed insight, provide little guidance in proper interpretation because of their desire to capture all possible nuances.[9]

The purpose of this article is to fill that gap. It explores the use and role of the transaction standard in four different settings in federal civil procedure: (1) Federal Rule 15(c), governing the relation back of pleading amendments after the statute of limitations has run; (2) Federal Rules 13 and 20, governing the joinder of counterclaims, cross-claims, and parties;[10] (3) the development of ancillary jurisdiction, currently codified as supplemental jurisdiction in Section 1367;[11] and (4) the development

---

6. In most instances, admittedly, the treatise explication of the application of the transaction standard in a particular setting should provide sufficient guidance to those who consult it. But the problem is not with the lawyer who engages in such research. Rather, it is with the attorney who knows of the application or scope of the transaction standard in one setting and simply assumes that the same conclusions can or should be reached in another—the attorney who falls into "original sin."

7. When lumping together two related, but differing, situations under the same standard results or is likely to result in confusion, then the problem may be explored. *See, e.g.*, 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3625, at 618 (2d ed. 1984) (criticizing the Judicial Conference Committee that drafted the 1958 amendment of 28 U.S.C. § 1332(c) for saying that it would be easy to determine "the principal place of business" of a corporation because there were many cases interpreting the same words in § 11 of the Bankruptcy Act); *id.* § 3567.2 at 152 (criticizing the courts in cases involving pendent-party jurisdiction for lumping "together indiscriminately cases involving each of the three different contexts in which the question of pendent parties had been litigated").

8. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2425-26 (1986).

9. *See* BLACK'S LAW DICTIONARY 1496 (6th ed. 1990). *Black's* defines a transaction as:

> Something which has taken place, whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered. It is a broader term than "contract."

Id. (citing U.S. Hoffman Mach. Corp. v. Ebenstein, 96 P.2d 661, 662 (Kan. 1939), *opinion adhered to on reh'g*, 152 P.2d 788 (Kan. 1940)).

10. Federal Rule 14(a), governing third-party claims, also utilizes a transaction standard for purposes of authorizing the joinder of additional claims once a third-party defendant has been joined. The underlying policies applicable to that joinder situation, however, are essentially identical to those on which Rules 13 and 20 are based and thus will not be separately analyzed here.

11. 28 U.S.C. § 1367 (1994).

of modern claim preclusion, as reflected in the decisional law and in the *Restatement (Second) of Judgments*.[12] Admittedly, in each of these four settings, although the governing standard is a transactional one, additional relationships are included as well. For example, just reviewing the federal rules which utilize a transaction standard, Federal Rule 15(c) refers to "conduct, transaction, or occurrence";[13] Rules 13(a) and 13(g) refer to claims arising out of the same "transaction or occurrence";[14] and Rule 20 includes even broader language, authorizing parties to be joined when the claims involved arise out of a "series of transactions or occurrences."[15] These additional elaborations quite obviously can and should affect the results obtained—that is, whether a particular rule's standards are satisfied. But those distinctions are unimportant for purposes of this inquiry because my focus is not on harmonizing the results in the four areas I have identified. Rather, it is on how interpretations of what constitutes a transaction must be understood and made in light of the different underlying policies in each area. Thus, my intent is to explore how those differing policies may alter or shape the interpretation of the term "transaction" in some unique ways—to provide a comparative overview.

In this way, I hope to offer some insights and guidance about the important nuances involved in interpreting this core legal term. And that objective is, I believe, in keeping with the lifetime devotion of Professor Wright to his students and to the profession, a devotion by which he has been able to provide insight and cogency to areas that others find lacking in clarity, and thus, ultimately, to advance the growth and development of the law.

I. The Meaning of Transaction as Interpreted Through Policy

In order to engage in a comparison of the proper treatment of what constitutes a transaction in the four areas I have identified, we must first

12. Readers interested in an extended treatment of how the term transaction has been interpreted by the courts in each of these settings may refer to the following: on Federal Rule 15(c) (relation back of amendments), see 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1497, at 70-79 (2d ed. 1990); on Rules 13(a) (counterclaims) and 13(g) (cross-claims), see 6 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1410, at 50-58, § 1432, at 243-46 (2d ed. 1990); on Rule 20 (party joinder), see 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1653, at 381-86 (2d ed. 1986); on ancillary jurisdiction, see 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3523, at 106-16 (2d ed. 1984); and on claim preclusion, see 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4407, at 55-56, 62-64 (1981).

13. FED. R. CIV. P. 15(c).

14. FED. R. CIV. P. 13(a), (g).

15. FED. R. CIV. P. 20.

briefly examine the underlying policies that inform the term's interpretation in each area.

A. Rule 15(c), Relation Back of Pleading Amendments

Two general principles that underlie Federal Rule 15, the general federal amendment rule, are particularly applicable to subdivision (c), which governs the relation-back of amendments.[16] First, the rule encourages a liberal amendment practice in order to promote the opportunity to decide claims on the merits rather than on procedural technicalities.[17] Second, amendments are to be allowed consistent with the recognition that the pleadings in federal practice have the limited role of providing parties notice of what the action entails, rather than being relied upon for fact revelation or issue formulation.[18] These two principles support a very broad and liberal approach to amendments. When determining whether to allow a proposed amendment adding a new claim or a new party after the statute of limitations has run, however, notice becomes an important countervailing concern.[19] If the pleadings provided adequate notice that a particular transaction is involved, then the defendant is not entitled to the protection of the statute of limitations.[20] On the other hand, if the court cannot find that the transaction as stated in the original pleadings gave the defendant adequate notice that the proposed new matter might be involved in the lawsuit, then the defendant should be able to rely on the expiration

---

16. Rule 15(c) states in relevant part that:

> An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) 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, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

FED. R. CIV. P. 15(c).

17. *See* 6 WRIGHT, MILLER & KANE, *supra* note 12, § 1471, at 506-07.

18. *See id.* § 1471, at 507.

19. *See, e.g.*, Contemporary Mission, Inc. v. New York Times Co., 665 F. Supp. 248, 255 (S.D.N.Y. 1987) ("In deciding whether an amendment relates back, the principal inquiry is whether adequate notice has been given . . . ."), *aff'd*, 842 F.2d 612 (2d Cir. 1988); Senger v. Soo Line R.R., 493 F. Supp. 143, 145 (D. Minn. 1980) ("To decide whether an amendment relates back, the primary focus of the court is on the notice given to the opposing party . . . .").

20. *See, e.g.*, Union Pac. R.R. v. Nevada Power Co., 950 F.2d 1429, 1432 (9th Cir. 1991); Santana v. Holiday Inns, Inc., 686 F.2d 736, 738-39 (9th Cir. 1982); Wells v. HBO & Co., 813 F. Supp. 1561, 1565-66 (N.D. Ga. 1992).

of the limitations period and the amendment will be deemed time barred.[21] Fairness to the defending party demands that result. Consequently, the requirement that the proposed amendment arise out of the same transaction as elaborated in the original pleadings must be interpreted in light of that fairness concern and with an eye toward what legitimately should have been known or recognized as within the scope of the litigation as a result of the initial pleadings.[22]

B. Rules 13 and 20, Claim and Party Joinder

The role of the transaction requirement in the joinder context is quite different from that in the amendment arena. The use of the concept of a transaction as a basis for deciding which claims and parties are properly joined in a lawsuit (and in some instances required to be joined) has been part of the Federal Rules of Civil Procedure since their adoption in 1938. The standard is one derived from equity.[23] It permits joinder premised on notions of trial convenience, rather than resolving those questions based on inquiries into what substantive rights are involved, as was done at common law. This change, from reliance on more restrictive code formulas of what constituted a cause of action to a transaction standard, generally was lauded as one permitting the courts discretion to determine the proper scope of a lawsuit in light of convenience to the courts and to the litigants, thereby avoiding the necessity to relitigate the same issues in different lawsuits. As noted by Professor Wright in an article commenting on similar developments in state procedure: "[C]ourts do not exist to formulate concepts; they exist, rather, to adjudicate controversies . . . . Any device which will reduce the volume of litigation and end the necessity for litigating the same issues over and over in different lawsuits is highly desirable."[24]

Thus, modern joinder policy is to encourage resolving controversies in one lawsuit rather than many, and that policy underlies the determination

---

21. *See, e.g.*, McGregor v. Louisiana State Univ. Bd. of Supervisors, 3 F.3d 850, 863-64 (5th Cir. 1993); Percy v. San Francisco Gen. Hosp., 841 F.2d 975, 979 (9th Cir. 1988); Marine Midland Bank v. Keplinger & Assocs., 94 F.R.D. 101, 104 (S.D.N.Y. 1982); Holdridge v. Heyer-Schulte Corp., 440 F. Supp. 1088, 1094 (N.D.N.Y. 1977).

22. When an amendment seeks to add a new party, notice concerns are heightened even further and Rule 15(c) includes additional requirements to ensure that sufficient notice exists. *See generally* 6A WRIGHT, MILLER & KANE, *supra* note 12, § 1498 at 107; Sherman L. Cohn, *New Federal Rules of Civil Procedure*, 54 GEO. L.J. 1204, 1235-37 (1966).

23. *See* FED. EQ. R. 30 *in* JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 209 (8th ed. 1933) ("The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit . . . ."); *see also* FED. R. CIV. P. 13 advisory committee's note 1 (1939) (describing Federal Rule 13 as substantially the same as a broadened Equity Rule 30).

24. Charles Alan Wright, *Modern Pleading and the Alabama Rules*, 9 ALA. L. REV. 179, 196-97 (1957).

of what may constitute a transaction for purposes of Federal Rules 13 and 20.[25] Weighed against that objective is the consideration whether the claims or parties are sufficiently related so that determining them in a single trial will be convenient.

To effectuate those policies when interpreting the joinder rules, courts most frequently have invoked the flexible test of whether the proposed claims are "logically related" and thus should be tried together.[26] Indeed, this test was suggested in a pre-rule case decided by the Supreme Court involving compulsory counterclaims, *Moore v. New York Cotton Exchange*,[27] when the Court commented: "'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship."[28] The logical relationship test has been utilized by the courts to determine the propriety of joinder when the question posed is whether the defendant is allowed to assert a cross-claim against a co-defendant under Federal Rule 13(g)[29] or whether plaintiffs may join together in asserting claims against a defendant or a plaintiff may join

---

25. Rule 13(a), which governs compulsory counterclaims, states in relevant part that:

> 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.

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

Rule 13(g), which covers cross-claims against co-parties, states in relevant part that:

> A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurreuce that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.

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

Rule 20(a), which governs permissive joinder of parties, provides in relevant part that:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

FED. R. CIV. P. 20(a).

26. In the compulsory counterelaim arena, courts actually have utilized the following four different tests: (1) The same issue of fact and law test: "Are the issues of fact and law raised by the claim and counterclaim largely the same?" (2) The res judicata test: "Would res judicata bar a subsequent suit on defendant's claim absent the compulsory counterclaim?" (3) The same evidence test: "Will substantially the same evidence support or refute plaintiff's claim as well as defendant's counterclaim?" and (4) The logical relation test: "Is there any logical relation between the claim and counterclaim?" 6 WRIGHT, MILLER & KANE, *supra* note 12, § 1410, at 52-55 & nn.7-10. It is clear, however, that the logical relationship test has the widest acceptance in the courts. *See id.* § 1410, at 65.

27. 270 U.S. 593 (1926).

28. *Id.* at 610.

29. *See, e.g.*, LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander, 414 F.2d 143, 147 (6th Cir. 1969); Allstate Ins. Co. v. Daniels, 87 F.R.D. 1, 5 (W.D. Okla. 1978); Old Homestead Bread Co. v. Continental Baking Co., 47 F.R.D. 560, 563 (D. Colo. 1969).

several defendants in a single action under Federal Rule 20,[30] as well as when the issue is whether the defendant is required to assert a counterclaim because it is compulsory under Federal Rule 13(a).[31] In all of these instances, when the courts consider whether the claims presented are logically related and thus meet the transaction requirement, the underlying philosophy guiding their decisions is to allow or require joinder if doing so will expedite the resolution of the entire controversy between the parties.[32] As will be explored later,[33] however, in the case of compulsory counterclaims, that inquiry also may involve additional concerns such as when the question is raised not at the outset of the litigation but after it has concluded, so that Rule 13(a) is being invoked for purposes of preventing a party from introducing a claim on the ground that it was improperly omitted from an earlier action.

C. *Ancillary (Supplemental) Jurisdiction*

The parallel, if not identical, policy of encouraging judicial efficiency and economy underlies the development of ancillary jurisdiction.[34] The

---

30. *See, e.g.*, Travelers Ins. Co. v. Intraco, Inc., 163 F.R.D. 554, 556 (S.D. Iowa 1995); McLernon v. Source Int'l, Inc., 701 F. Supp. 1422, 1425 (E.D. Wis. 1988); Dougherty v. Mieczkowski, 661 F. Supp. 267, 278 (D. Del. 1987).

31. *See, e.g.*, Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1071 (2d Cir. 1977); Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961); Grumman Sys. Support Corp. v. Data Gen. Corp., 125 F.R.D. 160, 164 (N.D. Cal. 1988); Establissement Tomis v. Shearson Hayden Stone, Inc., 459 F. Supp. 1355, 1364 (S.D.N.Y. 1978).

32. For a discussion of the purposes underlying Rule 13, see 6 WRIGHT, MILLER & KANE, *supra* note 12, § 1403, at 15-16. For a discussion of the purposes underlying Rule 20, see 7 WRIGHT, MILLER & KANE, *supra* note 12, § 1652, at 371-75.

33. *See infra* text accompanying notes 95-97.

34. Care must be taken not to assume total co-extensiveness between the rules and jurisdictional precedent because the ultimate determination regarding jurisdiction involves factors in addition to whether the claims arise out of the same transaction, so that a court may decline jurisdiction even though the transaction standard is satisfied. Section 1367(c) states that:

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c) (1994).

For one example of a court refusing to hear a claim when jurisdiction was authorized, see *James v. Sun Glass Hut of California, Inc.*, 799 F. Supp. 1083 (D. Colo. 1992) (declining to exercise jurisdiction when the three state claims clearly predominated over the sole federal claim under the Age Discrimination in Employment Act). For additional background on this topic, see generally John B. Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C. DAVIS L. REV. 735, 766-67 (1991) (mentioning respect

availability of ancillary jurisdiction ensures that federal courts are able to completely dispose of disputes that otherwise might be subject to piecemeal litigation because of the limited jurisdiction conferred on the federal courts.[35] As long as the court has proper jurisdiction over the principal case, then additional matters may be joined in order to permit complete adjudication.[36]

Here, however, the use of a transaction standard to assess when it is appropriate to exert jurisdiction over these additional matters was not a product of rule definition, but rather a result of judicial decisions.[37] The standard was later implicitly endorsed by Congress in its 1990 codification of supplemental jurisdiction, 28 U.S.C. section 1367. Congressional

---

for state authority and the avoidance of unnecessary adjudication of federal constitutional issues as reasons for courts declining to exercise supplemental jurisdiction), and John D. Carey, Comment, *The Discretionary Exercise of Supplemental Jurisdiction Under the Supplemental Jurisdiction Statute*, 1995 BYU L. REV. 1263, 1288-94 (categorizing the four main views taken by courts in interpreting what the supplemental jurisdiction statute allows as follows: the plain meaning approach, the *Gibbs* standard, the *Executive Software* standard, and the (c)(4) approach).

Further, in the case of Rule 20 party joinder, supplemental jurisdiction cannot be utilized to avoid the complete diversity requirement in cases based on diversity of citizenship jurisdiction, even though the claims by or against the joined parties may be transactionally related. *See* Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 374 (1978). Section 1367(b) states:

> (b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

28 U.S.C. § 1367(b).

35. The same policy concerns also spurred the development of the judicial doctrine of pendent jurisdiction, although the standard articulated there was whether the claims to be joined arose out of a "common nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). As the Supreme Court acknowledged, there was considerable overlap between these two jurisdictional doctrines. *See Owen Equip.*, 437 U.S. at 370 (stating that pendent and ancillary jurisdiction are "two species of the same generic problem: Under what circumstances may a federal court hear and decide a state-law claim arising between citizens of the same State?"). That overlap also caused some confusion in determining the correct application of the pendent/ancillary jurisdiction nomenclature to varying situations. The supplemental jurisdiction statute merges the two into one newly named form of jurisdiction.

36. The propriety of adjudicating certain matters as within the court's ancillary jurisdiction arises in contexts beyond those involving the pretrial joinder of claims and parties, and in many of those settings the courts do not rely on a transaction standard as a means of determining whether jurisdiction is proper. For example, ancillary jurisdiction has been asserted to allow a court to continue jurisdiction in order to ensure that its judgment is properly carried out, *see, e.g.*, Dugas v. American Sur. Co., 300 U.S. 414, 428 (1937), as well as to restrain state court litigation involving issues already determined in a federal action, *see, e.g.*, Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356, 367 (1921).

37. A transaction standard also has been used in interpreting other jurisdictional bases. *See, e.g.*, Bank One Chicago v. Midwest Bank & Trust Co., 116 S. Ct. 637, 643 (1996) (interpreting jurisdiction under the Expedited Funds Availability Act).

endorsement is only implied because the statute itself specifically allows the assertion of jurisdiction when the additional claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."[38] Although this language does not refer to "transaction," the legislative history makes clear that it was meant to include the prior case law developed by the courts.[39] Consequently, a transactional relationship—again, frequently expressed in terms of whether a logical relationship is present[40]—remains a prerequisite for determining whether supplemental jurisdiction exists.[41]

A brief look at how the transaction standard evolved under ancillary jurisdiction reveals both its breadth and its constraints. The Supreme Court's adoption of ancillary jurisdiction predates the federal rules and appears in the 1926 case of *Moore v. New York Cotton Exchange*, which was mentioned earlier.[42] The adoption of the Federal Rules in 1938, with their broad provisions for joinder,[43] provided increased opportunities for the application of ancillary jurisdiction, and the courts responded receptively. Although rule and jurisdiction developments thus essentially are congruent,[44] jurisdiction was not, and could not, be created by the

---

38. 28 U.S.C. § 1367(a).

39. The statute was adopted in response to a recommendation of the Federal Courts Study Committee that Congress had created. The report of that committee, among other things, called for the adoption of a statute to clarify the propriety of jurisdiction in cases currently within the judicial doctrines of pendent and ancillary jurisdiction. *See* THE FED. COURTS STUDY COMM., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 47 (1990). In particular, it recommended "that Congress expressly authorize federal courts to hear any claim arising out of the same 'transaction or occurrence' as a claim within federal jurisdiction, including claims, within federal question jurisdiction, that require the joinder of additional parties, namely, defendants against whom that plaintiff has a closely related state claim." *Id.*

40. *See, e.g.*, Revere Copper & Brass, Inc. v. Aetna Cas. & Sur. Co., 426 F.2d 709, 714 (5th Cir. 1970).

41. *See, e.g.*, Blue Dane Simmental Corp. v. American Simmental Ass'n, 952 F. Supp. 1399, 1408 (D. Neb. 1997). Because the ancillary and pendent jurisdiction doctrines were merged, however, reference to the "common nucleus of operative fact" standard also is appropriate, *see supra* note 35, and numerous lower courts have resorted to that test rather than utilizing a transactional approach. *See, e.g.*, Picard v. Bay Area Reg'l Transit Dist., 823 F. Supp. 1519, 1526 (N.D. Cal. 1993); James v. Sun Glass Hut of Cal., Inc., 799 F. Supp. 1083, 1084 (D. Colo. 1992).

42. *See supra* text accompanying notes 27-28.

43. *See supra* text accompanying notes 23-33.

44. It is most common in cases involving the question whether Rule 13(a) or Rule 13(g) is satisfied for the courts simultaneously to rule on whether ancillary jurisdiction may be asserted, and the same transaction analysis is utilized for both inquiries. *See, e.g.*, *Blue Dane Simmental*, 952 F. Supp. at 1405; State Bank & Trust Co. v. Boat "D.J. Griffin," 731 F. Supp. 770, 773 (E.D. La. 1990); Pacific Mut. Life Ins. Co. v. American Nat'l Bank & Trust Co., 110 F.R.D. 272, 278 (N.D. Ill. 1986); Irving Trust Co. v. Nationwide Leisure Corp., 93 F.R.D. 102, 111 (S.D.N.Y. 1981); *see also* Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 n.1 (1974) ("If a counterclaim is compulsory, the federal court will have ancillary jurisdiction over it even though ordinarily it would be a matter for state court . . . .").

rules.[45] This point was elaborated in a well-known Third Circuit opinion by Chief Judge Biggs, *Great Lakes Rubber Corp. v. Herbert Cooper Co.*[46] He commented:

> It is stated frequently that the determination of ancillary jurisdiction of a counterclaim in a federal court must turn on whether the counterclaim is compulsory within the meaning of Rule 13(a). Such a statement of the law relating to ancillary jurisdiction of counterclaims is not intended to suggest that Rule 13(a) extends the jurisdiction of the federal courts to entertain counterclaims for the Federal Rules of Civil Procedure cannot expand the jurisdiction of the United States courts. What is meant is that the issue of the existence of ancillary jurisdiction and the issue as to whether a counterclaim is compulsory are to be answered by the same test. It is not a coincidence that the same considerations that determine whether a counterclaim is compulsory decide also whether the court has ancillary jurisdiction to adjudicate it. The tests are the same because Rule 13(a) and the doctrine of ancillary jurisdiction are designed to abolish the same evil, viz., piecemeal litigation in the federal courts.[47]

But to say that the tests are the same does not necessitate identical results in all cases. This is because courts determining jurisdiction not only have considerations of judicial economy and convenience to take into account, but also must make their evaluation against the constitutional constraint that they are courts of limited jurisdiction. This federalism concern places increased emphasis on the need to find a clear, logical relationship between the ancillary and primary claims.

D. Claim Preclusion

The final area in which the transaction standard will be examined is when it is used to define which claims are precluded from being asserted because they are within the scope of litigation that already was determined. As defined in the *Restatement (Second) of Judgments*, the dimensions of a claim for purposes of preclusion "includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."[48] The use of a transaction standard in the preclusion arena

---

45. *See* FED. R. CIV. P. 82 (stating that the Federal Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction of the United States district courts"); *see also* National Westminster Bank USA v. Cheng, 751 F. Supp. 1158, 1161 (S.D.N.Y. 1990) (holding that a Federal Rule of Civil Procedure "cannot expand the basis for subject matter jurisdiction of the district courts").

46. 286 F.2d 631 (3d Cir. 1961).

47. *Id.* at 633-34.

48. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).

emerged in response to changes in modern procedural rules that allowed, indeed encouraged, the broad joinder of claims and parties.[49] As noted in the *Restatement (Second)*, "The law of res judicata now reflects the expectation that parties who are given the capacity to present their 'entire controversies' shall in fact do so."[50] Like the approach taken in the joinder and ancillary jurisdiction areas,[51] the application of res judicata principles rests on a factual analysis of the relation between the various claims or theories being alleged in order to determine whether they constitute the same transaction so that additional litigation should not be allowed.[52] Further, this approach appears to create a direct tie between ancillary jurisdiction and claim preclusion because it suggests that if a claim would meet the transaction standard for supplemental jurisdiction purposes and thus could be brought, then it must be joined or it will be barred.[53]

---

49. The rationale for this is explained in *Kilgoar v. Colbert County Board of Education*, 578 F.2d 1033 (5th Cir. 1978):

> [T]he modern view regards the same cause of action to refer to all grounds for relief arising out of the conduct complained of in the original action. Such a view is sensible where the procedure allows, as the Federal Rules allow, a claimant to put forward all grounds for relief in one action.

Id. at 1035 (citation omitted) (footnote omitted); Manego v. Orleans Bd. of Trade, 598 F. Supp. 231, 234 (D. Mass. 1984) ("Res judicata is a bar only where the subsequent case concerns the same cause of action or claim. With the adoption of the Federal Rules of Civil Procedure the concept of 'cause of action' has broadened beyond that of a single legal issue narrowly drawn in a writ." (emphasis omitted) (footnote omitted)), *aff'd*, 773 F.2d 1 (1st Cir. 1985).

50. RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a.

51. The overlap of jurisdiction and res judicata concerns appears expressly in the Supreme Court's pronouncement of the standard for asserting pendent jurisdiction. In *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), the Court prescribed a two-prong test for jurisdiction: that the claims "derive from a common nucleus of operative fact," and be ones that the pleader "would ordinarily be expected to try them all in one judicial proceeding." *Id.* at 725. This latter reference was generally viewed as referring to the law of claim preclusion. *See* Ambromovage v. United Mine Workers, 726 F.2d 972, 990 n.54 (3d Cir. 1984) (noting that the phrase "would ordinarily be expected to try them all in one judicial proceeding" is generally interpreted "to mean that the failure to raise a related state claim would be res judicata in a subsequent action" (emphasis omitted)). Nonetheless, it never appears to have obtained independent significance as a means of determining when jurisdiction was properly asserted. *See* Arthur R. Miller, *Ancillary and Pendent Jurisdiction*, 26 S. TEX. L.J. 1, 3 (1985) (commenting that the importance of the second prong of the *Gibbs* test is unclear and stating that it is not surprising that "most courts focus on the common nucleus of operative fact test").

52. *See, e.g.*, Catrone v. Ogden Suffolk Downs, Inc., 683 F. Supp. 302, 310 (D. Mass. 1988) (defining "transaction" pragmatically by "looking at the facts underlying the two actions" to determine if they are related in "time, space, origin, or motivation").

53. The *Restatement* adopts this conclusion, but allows an exception if the second court would find that the first court "would clearly have declined to exereise [jurisdiction] as a matter of discretion." RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. e. Some courts have not allowed even that exception. *See, e.g.*, Maldonado v. Flynn, 417 A.2d 378, 383-84 (Del. Ch. 1980) (requiring a plaintiff to demonstrate "that the prior court refused, or would have refused" to exercise jurisdiction); Rennie v. Freeway Transp., 656 P.2d 919, 921-24 (Or. 1982) (precluding plaintiff's claim "even though plaintiff did not have an absolute right to have his state law claim joined in . . . [a prior] federal court action").

But differences exist. The effect of finding that a particular claim is part of the same transaction as another claim already litigated is to prevent the party asserting the claim from ever being able to present it. Consequently, the policies underlying that definition require the delicate balancing of somewhat conflicting interests, including the desire to foster judicial economy and bring litigation to an end, and the countervailing interest of the plaintiff in vindicating his rights.[54] The assessment of how those policies may be affected in a given case will vary depending on various circumstances. Thus, the *Restatement (Second)* provides that the determination of what constitutes a transaction for preclusion purposes must be determined pragmatically and rests on an evaluation of several considerations.[55] These include matters such as "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."[56] In short, all of the policies identified with the three previous uses of the transaction standard are implicated in this setting.

II. A Comparative View—Avoiding Sin

Having noted the different, albeit often times overlapping, purposes or policies underlying the use of the transaction standard in the four areas just outlined, it should be apparent that those differences may affect the respective determinations in each area. That effect may be seen either in variances in the definition of what may fall within the scope of a transaction or in decisions to recognize exceptions to the standard or to adopt additional criteria that effectively narrow the circumstances in which a transactionally related claim or party will be found to otherwise meet the relevant standard. For example, there legitimately may be an inclination for a broad and liberal interpretation of what constitutes a transaction when the question is "Can I join this claim?" and thereby achieve a more economical resolution of the controversy. But a more narrow interpretation may seem appropriate if the question becomes "Is the plaintiff forever barred from asserting this claim?" Similarly, although notice and fairness concerns underlie both relation-back questions and claim-preclusion decisions, the definition of transaction may not be identical in those two

54. These same conflicting policies appear in the Rule 13(a) context when the question posed is whether a claim was compulsory and should have been introduced in prior litigation and thus has been waived. *See* Martino v. McDonald's Sys., Inc., 598 F.2d 1079, 1082 (7th Cir. 1979) ("Rule 13(a) is in some ways a harsh rule. . . . [It] is a result of a balancing between competing interests. The convenience of the party with the compulsory counterclaim is sacrificed in the interest of judicial economy.").

55. RESTATEMENT (SECOND) OF JUDGMENTS § 24(2).

56. *Id.*

settings. In the latter situation, the determination to treat the matter as within the same transaction deprives the plaintiff of the opportunity to present a claim at all, and a more narrow interpretation may seem appropriate in some circumstances given that effect. In the former, the scope of the transaction will depend on whether the defendant can be provided a fair opportunity to defend against the claim, which, depending on the circumstances and the stage of the proceedings when the issue is raised, may suggest that a broader interpretation is appropriate.

Stated another way, underlying the decisions in each of the four areas presented are concerns of convenience and judicial economy. Indeed, those concerns are the core, if not the exclusive, policies motivating interpretations of the joinder rules. But additional policies pertain in the other three areas and these policies may suggest, in some cases, either a more restrained view of what constitutes a transaction or that other exceptions should be recognized.[57] These additional policies involve the following considerations: notice issues in Federal Rule 15(c) relation-back situations; constitutional federalism constraints in supplemental jurisdiction cases; and basic fairness notions in preclusion settings. Consequently, only by considering the facts and circumstances presented in light of the policies relevant to a given area can an appropriate decision be made as to what should constitute a transaction.

In many, if not most, instances, all of the above policies may be satisfied and the same transaction defined in each of the four settings. However, as the scope of a proposed transaction is broadened in one setting to incorporate facts and circumstances that, though related, are more attenuated, policy conflicts may appear that would prevent the same definition from being used in another setting. When that occurs, these policy differences may lead to what superficially might seem to be inconsistent results in which a particular claim may be deemed part of the same transaction for one purpose, but not for another. But in fact there would be no inconsistency. Rather, the elasticity of the transaction concept would be meeting its purpose of permitting the courts discretion to determine when related matters should be tried together in light of the context in which the issue arises and the policies to be fostered thereby. The failure to engage in that contextual scrutiny would be to commit what Professor Cook rightly denominated as "original sin" so many years ago.

A few examples best highlight why such a nuanced interpretation is important and how it would operate. Let me turn first to a comparison of the use of the transaction standard in Federal Rule 15(c) as contrasted to its role in the preclusion arena. The question is whether or when the notice concerns that underlie Federal Rule 15(c) may suggest that relation

57. *See supra* Part I.

back is inappropriate, but if the question posed is: "Should these claims have been joined in one lawsuit so that an omitted claim now should be precluded?" the answer may be: "Yes, the same transaction is involved." Consider, for example, a case in which the new matter sought to be introduced by way of amendment involves new theories of relief necessitating inquiry into some additional facts. Depending on the facts, it could be argued that, based on the pleadings, such a change was not foreseeable and it would be an unfair surprise to allow an amendment seeking to expand the action so broadly, thereby wrongly depriving the defendant of the protection of the statute of limitations.

This essentially was the situation in *McGregor v. Louisiana State University Board of Supervisors*.[58] In that case a handicapped law student, Robert McGregor, had been refused advancement to his second year and brought suit against the university and various officials claiming that his rights under the Rehabilitiation Act of 1973 had been violated. The plaintiff had suffered permanently disabling head and spinal injuries during the 1970s and was admitted to the law school in 1988.[59] Prior to registration, he had requested that the law school permit him to be a part-time student in order to accommodate his disability. The law school denied that request on the grounds that it did not offer a part-time program and that the academic rules required that entering students attend full-time and achieve a certain grade point average. The school did, however, provide several other accommodations.[60] McGregor enrolled, but failed to meet the academic requirements during his first year. Nonetheless, the school readmitted him the next fall on scholastic probation, requiring him to meet several conditions, including that he carry a full class-load, but providing him other additional accommodations.[61] When he failed to meet his probation requirements after another year, McGregor petitioned for additional accommodations and the school responded by agreeing to readmit him, but again as a first-year student. He then renewed his petition, requesting that he be allowed to advance to second-year studies, as well as that he be

58. 3 F.3d 850 (5th Cir. 1993).

59. *Id.* at 854.

60. Initially, the school provided the plaintiff with a handicapped parking permit and additional time to complete his Criminal Law exam in the fall semester. When he failed to achieve the required grade point average at the end of that term, the school made other accommodations, such as allowing him to audit two classes and providing him individual tutoring. *Id.* at 855-56.

61. The law school provided a class schedule that allowed the plaintiff to attend classes in the newer building, which was better able to accommodate his wheelchair, and purehased several handicapped tables for the classrooms. Several professors also worked directly with the plaintiff on his academic work outside of class. Additionally, during the fall semester he was allowed to take his examinations at home with double-time. Although he was required to take his spring examinations at the school, extra time was provided with special provisions for a room and proctors equipped to accommodate his needs. *Id.* at 856.

given a reduced course-load.[62] When that petition was denied,[63] he filed suit on November 16, 1990.

The basis of McGregor's original complaint was that the law school discriminated against him by insisting he take a full-time schedule, have in-class examinations, and only be allowed to advance into the next level upon achievement of a certain grade point average.[64] Subsequently, he sought to amend his complaint on October 31, 1991, to add several professors and members of the readmissions committee as defendants and to add three due process claims.[65] Those claims were to the effect that he was denied due process in each of his petitions to the law school because the school did not provide a written procedure or policy notifying him of his right to appeal the denial of his petition. Because the due process claims were outside the statute of limitations, the only way in which they could be introduced into his lawsuit was if the amendment could be deemed to relate back under Rule 15(c) to the filing of the original complaint. The district court found that the due process claims did not arise out of the same transaction as the Rehabilitation Act claims and refused the amendment, and the Fifth Circuit affirmed. In an opinion by Judge Zagel, the appellate court noted:

> We agree with the district judge that the original complaint could not have put the Law Center on notice of the due process claims. The original complaint may suggest that McGregor was not satisfied with the Law Center's decisions, but it does not plead, even when liberally construed, that the Law Center's decision-making process was inadequate under the Fourteenth Amendment Due Process Clause. No mention is ever made in the prior pleadings of any appeals policy or procedure, and a Due Process claim requires more than a showing that the Law Center refused to accommodate McGregor as requested. McGregor's amendment attempted to add a new legal theory unsupported by factual claims raised in the original complaint. As we see it, the due process claims, seeking relief for the Law Center's inadequate appeal process, set forth new and distinct conduct, transactions, or occurrences not found in the original complaint.[66]

This decision seems clearly consistent with the notice and fairness concerns underlying Federal Rule 15(c). The scope of the transaction involved in the McGregor case might be viewed differently, however, if the question

---

62. *Id.* at 856-57.

63. The law school did, however, make some adjustments to its readmission decision, reducing McGregor's schedule of repeated first-year courses to allow him to make room for some upper-class courses. *Id.* at 857.

64. *Id.*

65. *Id.* at 863 n.20.

66. *Id.* at 864.

posed were not whether a time-barred amendment was permissible, but whether McGregor, having lost a summary judgment motion on his Rehabilitation Act claims, could file a second lawsuit against the school claiming a lack of due process in the readmission process. Under those circumstances, it is most likely that the court would conclude that all the potential claims or legal theories arising out of McGregor's time at the law school and the various accommodations and petitions that took place while he was there ought to have been determined in one lawsuit because they were all part of the same transaction. Thus, his failure to include them in his first lawsuit would mean that his due process claims would be precluded.

Indeed, in a similar case in which a civilian employee was terminated by the Air Force, the Fourth Circuit ruled that the employee's due process claims, which were focused on the termination proceeding itself, were part of the same transaction already resolved in earlier litigation in which the employee had challenged his termination as being violative of Title VII and the Privacy Act.[67] The conclusion that courts confronting a preclusion issue most likely would view the transaction more broadly than if a relation-back question was presented also is supported by numerous preclusion cases in which courts have found that all the relevant theories supporting relief arising out of a dispute between the parties—even those that involve facts occurring over time[68]—should have been tried together as they were part of the same transaction.[69] This broad interpretation is consistent with the fact that res judicata prevents the litigation of not only what was adjudicated, but also what ought to have been litigated in the first suit as well. Although fairness is at the heart of the preclusion doctrine, in that setting fairness encourages a broader interpretation of what is involved in the transaction in order to provide repose and to protect the defendant from

---

67. *See* Keith v. Aldredge, 900 F.2d 736, 741 (4th Cir. 1990).

68. According to the *Restatement (Second) of Judgments*:

> When a defendant is accused of successive but nearly simultaneous acts, or acts which though occurring over a period of time were substantially of the same sort and similarly motivated, fairness to the defendant as well as the public convenience may require that they be dealt with in the same action.

RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. d (1982).

69. *See, e.g.*, Feminist Women's Health Ctr. v. Codispoti, 63 F.3d 863 (9th Cir. 1995) (precluding a RICO action by an abortion clinic against protesters because of an earlier injunction action against those protesters in the state courts); International Union of Operating Eng'rs-Employers Constr. Indus. Pension, Welfare, and Training Trust Funds v. Karr, 994 F.2d 1426, 1429 (9th Cir. 1993) (precluding an employee benefit trust fund's claim to compel, audit, and recover accurate payments because of an earlier action involving delinquent payments over a previous period); Shaver v. F.W. Woolworth Co., 840 F.2d 1361, 1365 (7th Cir. 1988) (precluding state law contract claims because they were part of the same transaction resolved in a prior federal action based on the Age Discrimination in Employment Act).

multiple litigation.[70] This is in contrast to the fairness concerns underlying Rule 15(c), which suggest a narrower construction of the transaction in order to avoid undue surprise to the defendant.[71]

A similar difference in analysis may appear in circumstances in which the issue presented is whether a single transaction is present for relation-back purposes, in contrast to the issue of whether particular parties or claims may be joined in the same lawsuit and are within the court's supplemental jurisdiction. Different determinations of what falls within the scope of a transaction in those settings also may be fully justifiable because the primary concern in the joinder setting is whether judicial economy will be fostered and repetitive litigation avoided if the claims are tried in the same lawsuit.[72] The same concerns support the assertion of supplemental jurisdiction.[73] In contrast, notice and fairness concerns may counsel a narrower focus when relation-back questions are at issue. Further, it is worth noting that the efficiency policies that underlie amendment practice and encourage a liberal amendment policy are not eroded by a narrower construction of the transaction in the relation-back setting because, effectively, the determination not to allow the amendment means that the additional claim is forever barred by the statute of limitations. A narrower construction denying the relation-back of the amendment thus does not result in overlapping, or even additional, lawsuits.

To illustrate this point consider the following case. The owner of a "key-man" life insurance policy brought a breach-of-contract action against the insurer for failure to pay on the policy.[74] The insurer's defense was that because the decedent had made false statements concerning his health in the application, it was not required to honor the contract. The plaintiff replied that the insurance company's agent knew of the decedent's health problems because the agent had arranged for another policy just a few months earlier in which the state of his health was known and that the earlier policy had been replaced by the one at issue. On the morning of trial, the plaintiff sought to amend the complaint to add a negligence count,

---

70. *See* Velasquez v. Franz, 589 A.2d 143, 147 (N.J. 1991) (characterizing the underlying rationale of res judicata as fairness by providing "finality and repose for the litigating parties"); 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4403, at 15-16 (discussing the importance of repose for ensuring fairness).

71. *See supra* text accompanying notes 19-22; Kimbro v. United States Rubber Co., 22 F.R.D. 309, 311 (D. Conn. 1958) ("[T]he test [for relation back of amendments under Rule 15(c)] is whether the original pleading 'clearly gave defendant notice that he would be held [liable] for all acts of negligence.'" (quoting Michelsen v. Penney, 135 F.2d 409, 416 (2d Cir. 1943))); 6A WRIGHT, MILLER & KANE, *supra* note 12, § 1497, at 85-89 (describing the courts' narrower construction of transactions under Rule 15(c) to ensure defendants receive adequate notice).

72. *See supra* text accompanying notes 23-26.

73. *See supra* text accompanying notes 34-36.

74. *See* Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co., 812 F. Supp. 966 (D. Neb. 1993), *aff'd*, 19 F.3d 431 (8th Cir. 1994).

claiming that the insurer, through its agent, was negligent when it failed to advise plaintiff of certain risks arising out of the replacement of the earlier policy.[75]

The statute of limitations with regard to the negligence theory had expired at the time the amendment was introduced so that the only way in which the claim could proceed was if the court found that it met the standards of Federal Rule 15(c). The court refused to allow relation-back, finding that the defendant "could not have reasonably anticipated it might have liability for negligent failure to give the replacement policy warning when it was served with the plaintiff's 1988 complaint and when it thereafter engaged in discovery respecting that complaint."[76] Further, the court noted that "the factual thrust of the two theories of recovery is so different that a reasonably prudent person would not have perceived exposure on the negligence theory of recovery when served with the complaint on the contract theory of recovery."[77] Consequently, the court found that the amendment did not arise out of the same transaction as the one set forth in the original complaint.[78]

Again, the court's conclusion appears sound, particularly given that the amendment was sought after discovery was completed and the trial was scheduled to begin. This is true even though both the negligence and contract claims sprang from the same course of dealings between the insurer's agent and the decedent. In analogous situations when joinder questions are posed, however, different conclusions may be reached. For example, in one case insureds were allowed to join a claim seeking a declaratory judgment against their insurer that their policy provided coverage for a particular occurrence with a claim against the insurance agents alleging that they misrepresented the policy coverage when selling it to the insureds.[79] More generally, in contract disputes all the parties involved in the course of dealings that lead to a contract typically have been allowed to be joined in order to allow one adjudication to resolve who may be at fault.[80] The contract becomes the transactional nexus supporting joinder. Further, even when additional claims rest on tort rather than contract theories, courts have found their joinder proper and the transaction

75. *See id.* at 969.

76. *Id.* at 970.

77. *Id.* at 971 (footnote omitted).

78. *See id.*

79. *See* Travelers Ins. Co. v. Intraco, Inc., 163 F.R.D. 554, 556-57 (S.D. Iowa 1995).

80. Indeed, in the cross-claim context, the transaction standard has been met when multiple contracts are involved in a complex business transaction involving multiple parties, stretching over a period of time. *See, e.g.*, LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander, 414 F.2d 143, 147 (6th Cir. 1969); R.E. Linder Steel Erection Co. v. Alumisteel Sys., Inc., 88 F.R.D. 629, 632 (D. Md. 1980) (both holding that a prime contract and several subcontracts that dealt with one building project arose from the same transaction or occurrence).

standard met.[81] The change in theory, even when it necessitates an inquiry into some additional facts, does not preclude joinder; the goal of promoting judicial economy and efficiency predominates.[82]

Similar broad interpretations of what constitutes a transaction are reached in cases presenting jurisdiction issues in which different state and federal theories are alleged to support relief for harm arising out of a particular course of conduct.[83] Preclusion decisions also support a broad interpretation of what constitutes a transaction so as to include within its scope tort and contract claims that spring from a particular course of dealings. The failure to join all such claims in one lawsuit will result in the preclusion of any omitted claim.[84] As noted in the *Restatement (Second) of Judgments*:

> That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several

---

81. *See, e.g.*, Geisinger Med. Ctr. v. Gough, 160 F.R.D. 467, 469 (M.D. Pa. 1994) (holding that a medical malpractice claim was a compulsory counterclaim in a medical center's action for unpaid medical bills); Banner Indus. v. Sansom, 830 F. Supp. 325, 328 (S.D. W. Va. 1993) (ruling that a defamation claim was a compulsory counterclaim in a breach of contract action). In the cross-claim context, a logical relation has been found between an insurance company's primary claim seeking a declaratory judgment of noncoverage and a cross-claim by the injured party against the insured seeking tort damages. *See, e.g.*, Plains Ins. Co. v. Sandoval, 35 F.R.D. 293 (D. Colo. 1964). The justification is that the insured's defense against liability is similar to the reason for asserting noncoverage by the insurance company. *See id.* at 296. If it is different, then no logical relationship will be found. *See, e.g.*, Allstate Ins. Co. v. Daniels, 87 F.R.D. 1, 5 (W.D. Okla. 1978) (finding that because a cross-claim was not related to whether there was insurance protection, the claim did not arise out of the same transaction or occurrence).

82. The key, of course, is whether there are significant overlapping facts or whether entirely new or unrelated facts will need to be proven so that little efficiency would be gained by treating the theories as springing from a single transaction and allowing their joinder in a single lawsuit. The inclusion in some of the joinder rules of language authorizing joinder when a "series" of transactions is involved also may allow the claims to go forward together, when the reference to a single transaction in Federal Rule 15(c) would not. *Compare* Moore v. Baker, 989 F.2d 1129, 1132 (11th Cir. 1993) (denying relation-back in a medical malpractice case asserting a lack of informed consent when the amendment sought to add claims related to negligence that occurred during and after surgery), *with* Rodriguez v. Abbott Labs., 151 F.R.D. 529 (S.D.N.Y. 1993) (permitting the plaintiff to join the drug manufacturer against whom he was asserting a products liability claim with the hospital against whom he was asserting a medical malpractice claim for aggravating his injuries), *and* Lucas v. City of Juneau, 127 F. Supp. 730, 732 (D. Alaska 1955) (allowing the plaintiff to join both the store owner and the ambulance company in the same action seeking relief for an initial injury and the aggravation of that injury). The difference in treatment and in the language of the rules themselves reflects the more cautious approach necessary in the Rule 15(c) context because of notice concerns, which are not present when joinder is at issue.

83. Because ancillary jurisdiction was developed in order to allow state and federal claims to be joined in one suit, changes in theory or in the source of the governing law, standing alone, cannot be a barrier to its assertion; otherwise the doctrine would serve no purpose.

84. *See, e.g.*, Mortell v. Mortell Co., 887 F.2d 1322, 1325 (7th Cir. 1989); Dowd v. Society of St. Columbans, 861 F.2d 761, 764 (1st Cir. 1988); Fiumara v. Fireman's Fund Ins. Cos., 746 F.2d 87, 91-92 (1st Cir. 1984).

> legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief.[85]

The foregoing discussion should not be taken to suggest that the interpretation of what constitutes a transaction always will be the same for joinder and res judicata purposes simply because those two doctrines rest on shared efficiency and judicial economy concerns. The overlap is great and in most instances probably will result in identical applications of the standard.[86] Nonetheless, in some circumstances, the additional preclusion concerns of ensuring that the party asserting the new claim is treated fairly and has an opportunity to be heard[87] may result in a narrower[88] interpretation of the transaction involved in the first suit than would be the case if the issue posed were whether the claims could be joined at the outset of the litigation.[89] Consider, for example, one district court case in which a supplier sued one of its customers, which was attempting to take it over, alleging ten specified acts that violated the federal securities laws.[90] After it lost, the supplier then sued claiming federal antitrust

---

85. RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. c (1982).

86. *See* Colonial Penn Life Ins. Co. v. Hallmark Ins. Adm'rs, Inc., 31 F.3d 445, 448 (7th Cir. 1994) (noting that the Fourth Circuit's test for compulsory counterclaims has been described as "ask[ing] little more than whether the plaintiff's claims would be barred by res judicata").

87. Although the Supreme Court suggested in one case that claim preclusion may be limited by a requirement that there was a full and fair opportunity to litigate in the first action, *see* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 480-81 (1982), no broad exception has emerged. Rather, what I am suggesting here is that those concerns may suggest a somewhat more restrained definition of the scope of the transaction involved in the first proceeding if circumstances support it.

88. Because an additional requirement for claim preclusion is that the omitted claim be one that could have been brought in the first action, the scope of a transaction for preclusion purposes cannot be broader than that allowed under the joinder rules; it can only be narrower.

89. This point was implicitly recognized by Judge Friendly in his concurring opinion in *United States v. Heyward-Robinson Co.*, 430 F.2d 1077 (2d Cir. 1970), when he disagreed with the majority's finding that the counterclaim at issue was compulsory and within the court's ancillary jurisdiction. He noted:

> Of course, it is tempting to stretch a point when a jurisdictional objection is so belatedly raised by the very party who clamored for the exercise of jurisdiction until the decision went against it. But we must consider the question as if Heyward [the defendant] had not pleaded the Stelma counterclaim and proceeded to sue D'Agostino in some other court for failure to perform that subcontract, and D'Agostino then claimed that Heyward's failure to bring the Stelma transaction into this Miller Act suit barred the later action. Despite the desirability of requiring that all claims which in fact arise "out of the transaction or occurrence that is the subject matter of the opposing party's claim" be litigated in a single action, courts must be wary of extending these words in a way that could cause unexpectedly harsh results.

Id. at 1087 (Friendly, J., concurring).

90. *See* GAF Corp. v. Circle Floor Co., 1971 Trade Cas. (CCH) ¶ 73,588 (S.D.N.Y. 1971). The decision is explained and approved by noting that in some cases litigation complexity and confusion may justify splitting claims in situations that otherwise might appear tightly related. *See* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4408, at 70.

violations stemming from the same ten acts and one additional act. Preclusion was denied.[91] Yet, had the issue been whether the supplier could join with its securities act claims additional fraud claims or state unfair competition claims arising out of the same ten acts, numerous jurisdiction cases make clear that the answer would be: "Yes, the claims are sufficiently related."[92] Cases involving compulsory counterclaims similarly hold that defendant's assertion of a state tort claim in response to plaintiff's claim of antitrust[93] or trademark[94] violations meets the transaction standard of Federal Rule 13(a), as long as the counterclaim rests on the same or overlapping facts.

This discrepancy in treatment also is seen most readily when considering the scope of preclusion as applied to transactionally related counterclaims. In particular, the *Restatement (Second) of Judgments* provides that in jurisdictions in which a compulsory counterclaim rule exists, such as in the federal courts, preclusion applies if a counterclaim that would fall within the joinder standard is omitted.[95] However, it recognizes that in jurisdictions without compulsory joinder rules, the case-law suggests that preclusion will not obtain unless "[t]he relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action."[96] Admittedly, it can be argued that in those jurisdictions, the res judicata determination is not based on a narrow construction of what constitutes a transaction, but

---

91. *See GAF Corp.*, 1971 Trade Cas. (CCH) at ¶ 73,588 (denying preclusion because the two claims were "grounded on different theories containing different elements and requiring different factual determinations").

92. *See, e.g.*, Klaus v. Hi-Shear Corp., 528 F.2d 225, 231 (9th Cir. 1975) (permitting federal court jurisdiction of breach of fiduciary duty claims in addition to claims of violation of the Securities Exchange Act of 1934); Vanderboom v. Sexton, 422 F.2d 1233, 1242 (8th Cir. 1970) (reversing a dismissal of state fraud claims that had been brought with a claim of violation of federal securities law); *cf.* Tacker v. Wilson, 830 F. Supp. 422, 431 (W.D. Tenn. 1993) (allowing joinder of a state tort claim with an antitrust claim because the tort claim was "an outgrowth of the alleged conspiracy, and the alleged conspiracy form[ed] the basis of the Sherman Act claim").

93. *See, e.g.*, Centennial Sch. Dist. v. Independence Blue Cross, 885 F. Supp. 683, 685-86 (E.D. Pa. 1994); Sikes v. Rubin Law Offices, P.C., 102 F.R.D. 259, 262 (N.D. Ga. 1984); Super Prods. Corp. v. D P Way Corp., 75 F.R.D. 659, 661 (E.D. Wis. 1977).

94. *See, e.g.*, Polaris Pool Sys. v. Letro Prods., Inc., 161 F.R.D. 422, 425 (C.D. Cal. 1995); Official Airline Guides, Inc. v. Churchfield Publications, Inc., 756 F. Supp. 1393, 1407 (D. Or. 1990), *aff'd*, 6 F.3d 1385 (9th Cir. 1993).

95. RESTATEMENT (SECOND) OF JUDGMENTS § 22(2)(a) cmt. e (1982). Courts refer to the problem of the omitted compulsory counterclaim using various terminology, such as waiver, estoppel, and res judicata. *See* 6 WRIGHT, MILLER & KANE, *supra* note 12, § 1417, at 131-34. Whatever the nomenclature, the ultimate determination turns on a finding of whether the omitted claim was part of the same transaction as claims raised in earlier litigation.

96. RESTATEMENT (SECOND) OF JUDGMENTS § 22(2)(b); *see* 18 WRIGHT, MILLER & COOPER, *supra* note 12, § 4414, at 110-14.

effectively rests on another test entirely. Nonetheless, even though the defendant could have asserted a transactionally related counterclaim, because the rules did not require its assertion in those jurisdictions, courts have refused to adopt as broad an approach to the scope of res judicata as typically is utilized to determine when joinder is proper.[97] I would suggest that the reason for this difference is because of heightened concerns of assuring that the defendant is treated fairly. The defendant was not forewarned in the applicable joinder rules of the perils of omitting a transactionally related counterclaim, and the defendant did not choose the time or place of the lawsuit as well. These concerns outweigh the court's interest in promoting judicial economy. In effect, the courts in jurisdictions not having compulsory counterclaim rules have recognized an exception to the transaction standard when preclusion is at issue.

Finally, let us turn to a comparison of the treatment of the transaction standard in joinder and jurisdiction settings. Here the symmetry in the underlying policies results in virtually identical treatment. Given the intertwined history of the development of the transaction standard in the joinder and jurisdiction contexts,[98] it should not be surprising that the meaning of transaction appears coterminous in those settings. This does not mean, however, that the additional federalism policy constraints underlying jurisdiction questions are ignored. Rather, federalism concerns are addressed as part of the court's discretion under the supplemental jurisdiction statute, 28 U.S.C. section 1367(c). Unlike joinder, in which the parties have a right to assert the additional claims or join the additional parties if the particular rule's requirements are met, the assertion of supplemental jurisdiction is discretionary.[99] Further, as provided in the statute, the court is directed to take into account when determining whether to exercise its discretion some factors that effectively address the fact that federal court

97. For example, contrast the treatment of plaintiffs and defendants. There is no rule requirement that plaintiffs join all transactionally related claims in a single action. *See* FED. R. CIV. P. 18. Nonetheless, a plaintiff who omits such a claim may be precluded from asserting it in subsequent litigation under general preclusion rules. *See supra* text accompanying notes 48-53.

98. *See supra* text accompanying notes 42-47.

99. Prior to the enactment of the supplemental jurisdiction statute, courts evaluating the propriety of asserting ancillary jurisdiction typically focused solely on whether the necessary nexus to the main claim existed. Courts primarily exercised their discretion to decline jurisdiction in situations in which the main claim was dismissed or resolved in early stages of the litigation and the question presented was whether to retain jurisdiction to determine the ancillary claim. *See, e.g.*, Scott v. Long Island Sav. Bank, 937 F.2d 738 (2d Cir. 1991); Harris v. Steinem, 571 F.2d 119 (2d Cir. 1978); Mirkin, Barre, Saltzstein, Gordon, Hermann & Kreisberg, P.C. v. Noto, 94 F.R.D. 184 (E.D.N.Y. 1982). The notion that the court should consider discretionary factors when initially determining jurisdiction was part of the pendent jurisdiction analysis set forth by the Supreme Court, however. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). The merger of ancillary and pendent jurisdiction in the supplemental jurisdiction statute and the inclusion of specific discretionary factors there, *see* 28 U.S.C. § 1367(c) (1994), makes those discretionary factors relevant for all jurisdictional assertions today.

jurisdiction is limited and that decisions to assume jurisdiction must be made carefully in order to avoid improperly intruding on state interests.[100] Consequently, because of the adoption of these additional discretionary criteria, there is not a need to consider the limited jurisdiction or federalism concerns in the context of determining whether the transaction requirement has been satisfied. Those policies are effectuated through other means.

Although a comparison of the transaction standard in joinder and jurisdiction cases reveals no real difference in treatment, the joinder cases themselves reveal that differences in definition may occur between cases in which the joinder issue involves additional parties and claims under Federal Rule 20, in contrast to those involving pure claim joinder under Federal Rule 13. In the former context, the courts reflect heightened concern regarding the potential complication of the case caused by the joinder of additional parties. As a result, there is greater scrutiny on the level of factual overlap between the claims needed to support joinder. Claims that in two-party litigation might be determined to arise out of the same transaction and thus fall within the court's supplemental jurisdiction may be found to present sufficient new facts so that they will not meet the transaction standard in a multiple-party context.[101]

These differences in interpretation also are supportable as a matter of policy. Effectively, the conclusion that the standard is not met in the Rule 20 context represents a determination that efficiency concerns would not be clearly promoted by joinder and may be outweighed by the complications introduced into the case by including the additional parties. Those considerations certainly are properly within a court's purview. Thus, assessing what constitutes a transaction in light of the underlying policies involved may produce different determinations even when the same policies are implicated, at least when the issue arises in a different context. In sum, great sensitivity to policy differences (in some instances mere policy nuances) is needed when attempting to make generalizations about when applicable transaction standards are met.

---

100. In particular, the statute provides that the court may consider in deciding whether to decline jurisdiction if "the claim raises a novel or complex issue of State law," and if "the [additional] claim substantially predominates over the claim or claims over which the district court has original jurisdiction." 28 U.S.C. § 1367(c)(1)-(2).

101. Compare *Magnavox Co. v. APF Electronics, Inc.*, 496 F. Supp. 29, 34 (N.D. Ill. 1980), in which the court refused joinder under Rule 20(a) of two retailer defendants in a suit claiming that goods sold by each defendant infringed plaintiff's patent, with *LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander*, 414 F.2d 143, 145-47 (6th Cir. 1969), and *R.E. Linder Steel Erection Co. v. Alumisteel Systems, Inc.*, 88 F.R.D. 629, 632 (D. Md. 1980), which deal with cross-claims involving multiple contracts.

III. Conclusion

As underscored by the illustrations in the preceding section, care must be taken when applying the transaction standard to the varying doctrines and rules for which it serves as a gatekeeper. The standard's inherent flexibility provides the courts discretion to develop the law in light of the circumstances of each case, while fostering judicial efficiency and economy and promoting decisions on the merits, rather than relying on rigid rules or technicalities. That very flexibility, however, also offers a trap for the unwary lawyer who does not understand how varying policies may influence its interpretation in separate contexts.

It is possible to arrive at an appropriate definition in a given case only by considering whether the proposed scope of a transaction will meet the objectives and policies underlying the standard that is involved. Further, arguments as to what should be included within a particular transaction are best made by referring to those related policies as they provide the basis for a broad or narrow interpretation of the standard as applied to the factual circumstances involved. Consequently, although this piece does not (indeed cannot) provide an answer to the question of what constitutes a transaction, it is hoped that it points the way for others as to how to approach that inquiry with greater understanding of what should be entailed.