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Seeing the Forest for the Trees: The Transaction or Occurrence and the Claim Interlock Civil Procedure

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SEEING THE FOREST FOR THE TREES: THE TRANSACTION OR OCCURRENCE 
AND THE CLAIM INTERLOCK CIVIL PROCEDURE
By Douglas D. McFarland*

I. INTRODUCTION

A century ago, one well-known opinion moaned “courts and text-writers have been busy for more than half a century drafting and redrafting definitions” of “transaction” without much resulting “clarity of thought.”\(^1\) A few years later, the Supreme Court of the United States declared “‘Transaction’ is a word of flexible meaning.”\(^2\) Courts today struggle mightily with the lineal descendant “transaction or occurrence;” many throw up their hands, muttering darkly about a case-by-case basis.\(^3\) Respected scholars argue no definition of “transaction or occurrence” is possible and the search for a definition is counterproductive.\(^4\)

So why continue trying? First, the transaction or occurrence—along with the claim—is one of the two basic building blocks of rules-based civil procedure. The reporter for the committee drafting the Federal Rules of Civil Procedure has written “[T]he new rules make it clear that it is not differing legal theories, but differing occurrences or transactions, which form the basis of separate units of judicial action. Cf. Rules 10(b), 13(a), and (g), 15(c), 54(b) . . ..”\(^5\) This article

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\(^1\)McArthur v. Moffett, 143 Wis. 564, ___, 128 N.W. 445, 445 (1910).


\(^3\)See infra Part II.


\(^5\)Atwater v. North Am. Coal Corp., 111 F.2d 125, 126 (2d Cir. 1940) (Clark, J., concurring). This quotation is recited with approval by the Supreme Court in Reeves v. Beardell, 316 U.S. 283, 285 (1942).
follows the transaction or occurrence, and the claim, through these rules, and the length of civil
procedure, to the conclusion that the rules are an interlocked system.  

Second, the search is not as difficult as thought. Courts have made hard work out of an
easy task. The transaction or occurrence as a “unit[] of judicial action” is properly defined
factually. It is fact-based. It is a set of facts, a grouping of facts, a guide to the facts, or perhaps
more specifically a common core of operative facts. This necessarily means the transaction or
occurrence—the unit of judicial action—will expand or contract depending on the facts of the
individual case. Law is irrelevant. This explains why courts have had such difficulty attempting
to define the transaction or occurrence. Courts and attorneys keep trying to find a law-based
definition, creating and employing glosses on the transaction or occurrence as they search in vain


6FED. R. CIV. P. 8(a)(2) requires pleading a short and plain statement of a claim. See infra Part
III.A. FED. R. CIV. P. 10(b) strongly suggests pleading of separate transactions or occurrences in
separate counts. See infra Part III.B. FED. R. CIV. P. 13(a) identifies a compulsory counterclaim
as arising out of the same transaction or occurrence. See Douglas D. McFarland, In Search of the
Transaction or Occurrence: Counterclaims, 40 CREIGHTON L. REV. 699 (2007). FED. R. CIV. P. 13(g) permits pleading a cross-claim arising from the same transaction or occurrence. See infra
Part II.B. FED. R. CIV. P. 14(a) permits pleading certain claims in third-party practice arising
from the same transaction or occurrence. See infra Part II.D. FED. R. CIV. P. 15(c) allows an
amendment to a pleading arising from the same conduct, transaction or occurrence to relate back. See infra Part III.D. FED. R. CIV. P. 20(a) permits joinder of parties when relief arises from the
same transaction or occurrence. See infra Part II.C. FED. R. CIV. P. 54(b) allows interlocutory
appeal in cases involving multiple claims. See infra Part IV.

7Referring to the “transaction” still required in joinder devices in code states, Charles E. Clark
recognizes “The more desirable rule seems to be to consider [this term] as referring to groupings
of operative facts, each one of somewhat greater extent, and merely limited by trial expediency.”
Referring to various joinder devices under the federal rules, a leading treatise states “As is true in
a number of other contexts, such as compulsory counterclaims, cross-claims, and certain third-
party claims, the search under Rule 15(c) [relation back of amendment] is for a common core of
operative facts in the two pleadings.” 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE &
(2000) depends on “the same case or controversy under Article III,” which is commonly
recognized to be a codification of the requirement of a “common nucleus of operative fact” for
See infra Part V.
for firmer guidance in the law.\textsuperscript{8} Courts should follow the lead of the iconic Sergeant Joe Friday in the television series \textit{Dragnet} to cut off glosses and tangents with a curt “just the facts, ma’am.”

Third, courts having difficulty identifying the transaction or occurrence forget the phrase is one of inclusion. The primary policy of the Federal Rules of Civil Procedure can colloquially be stated as “one suit fits all,” \textit{i.e.}, all aspects of a single set of facts–multiple theories of recovery, multiple parties, multiple claims–should be handled together within one suit to promote the policies of convenience, economy, and efficiency.\textsuperscript{9} Yet we commonly encounter courts excluding rather than including by resorting to a law-based definition or a gloss on the transaction or occurrence.

How should we respond? A traditional response is to write something such as “the decision is a grudging application of the rule” or “the court applies a tight factual nexus test rather than a loose factual nexus test.” With tepid responses such as these from commentators, courts continue to respond to misguided client advocacy by attorneys with decisions of exclusion that burden rules-based procedure. The response of this article is stronger: decisions of exclusion on the transaction or occurrence and the claim are often simply wrong. We should not be chary. These cases require application of straightforward rules; they are not cases of arguable principles or nuanced policy decisions about which reasonable people can differ. These cases simply call for application of a rule of well-known and clearly intended meaning to the facts of the individual case. Other writers are properly becoming bolder: one leading treatise calls out an

\textsuperscript{8}For example, courts have created no fewer than four separate glosses on transaction or occurrence in compulsory counterclaim cases. See Wright et al., supra note 7, § 1410, at 52-53; 3 James Wm. Moore et al., Moore’s Federal Practice §13.10[1][b] (3d ed.).

\textsuperscript{9}See infra Parts II.A, III.A.
opinion applying a restrictive standard to joinder of a cross-claim as “contrary to the explicit and unqualified language of Rule 13(g),” and another decision is said to “ignore[] both the purpose and the clear language of Rule 13(g).”\(^\text{10}\)

When the codes replaced the common law, judges trained in the common law afforded the new code procedures a “cold, not to say inhuman, treatment . . . by construction to import into the Code rules and distinctions from the common-law system . . .”\(^\text{11}\) The same process now has been at work for decades under the rules as judges continue to interpret rules through code lenses to exclude instead of to include.\(^\text{12}\) We should recognize this phenomenon and attempt to stop it by denouncing wrong decisions.

II. THE TRANSACTION OR OCCURRENCE IN VARIOUS JOINDER DEVICES

A. General Intent of Joinder Under the Rules

The philosophy behind the federal joinder rules, and state rules-based systems, is to draw all factually-related claims and parties into a single lawsuit to promote convenience and efficiency to both the court and the parties. It is the clear intent of the drafters of the federal rules.\(^\text{13}\) It is clear in the rule on joinder of claims, which is bring them all.\(^\text{14}\) It is embraced clearly by the leading early commentator on the rules in his pithy summary.

\(^\text{10}\)See Wright et al., supra note 7, § 1432, at 249-50.

\(^\text{11}\)McArthur v. Moffett, 143 Wis. 564, ___, 128 N.W. 445, 446 (1910). “It is interesting, if somewhat depressing, to observe the gradual development of an involved and technical practice from the piling up of precedents on an originally simple code.” Clark, supra note 7, § 12, at 60.

\(^\text{12}\)Many judges are code-trained, many live in states with code systems, and others simply do not understand the inclusive philosophy of the Fed. R. Civ. P. While some inappropriate excluding decisions come from courts of appeals, most are issued by district court judges sitting alone in states with state court code procedure systems.

\(^\text{13}\)The 14-member advisory committee drafted the Fed. R. Civ. P. under the leadership of Reporter Charles E. Clark (a professor at Yale Law School and later a federal court of appeals
“The purpose . . . is to make ‘one lawsuit grow where two grew before.’”15 It is recognized clearly by the Supreme Court: “Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.”16 It is clearly recognized by leading commentators today.17

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14Fed. R. Civ. P. 18(a): “A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.”

15Charles A. Wright, Joinder of Claims and Parties Under Modern Pleading Rules, 36 Minn. L. Rev. 580, 580 (1952) [hereinafter Joinder]. Professor Wright advises “if there is any reason why bringing in another party or another claim might get matters settled faster, or more justly, then join them. Somewhere in the rules there is surely authority for the joinder.” Id. at 632. In another early article, Wright opines a “modern pleading” system must include unlimited joinder of parties and claims. Charles A. Wright, Modern Pleading and the Alabama Rules, 9 Ala. L. Rev. 179, 181 (1956).


17Moore et al., supra note 8, § 20.02[1][a] (“[J]oinder is based not on arcane historic formulations of legal relationships, but on common sense, fact-based considerations. . . . Many federal joinder rules permit addition of claims or parties based on transactional relatedness.”); Wright et al., supra note 7, § 1652 (“Like the compulsory counterclaim rule, the goal of the permissive joinder of parties rule–also centered on the ‘transaction or occurrence’–is to prevent multiple lawsuits.”); Robert G. Bone, Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules, 89 Colum. L. Rev. 1, 80 (1989) (“The federal rules drafters . . . defined party structure primarily in terms of trial convenience, not in terms of right, and relied to a large extent on trial judge discretion to shape optimal lawsuit
Consequently, the attitude of a court should be to apply this overall philosophy. An earlier article explored compulsory counterclaim cases. This article continues that exploration through other joinder devices (cross-claims, permissive joinder of parties, and rule 14 claims), pleading (pleading a claim, pleading in separate counts, and relation back of amendments), and interlocutory appeal in a case including multiple claims. The conclusion follows that these rules form a consistent, interlocked system of procedure.

B. Cross-claims

The transaction or occurrence is the primary test for assertion of a cross-claim:

A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

18McFarland, supra note 5.

19See infra Parts II.B-II.D (joinder), III (pleading), and IV (interlocutory appeals).

20Fed. R. Civ. P. 13(g) [emphasis added].
A defendant is allowed to claim against another defendant—or a plaintiff against another plaintiff—only when the proposed cross-claim against the co-party arises from the same transaction or occurrence as a claim already within the litigation.\textsuperscript{21}

Here too the phrase is drafted and intended as a term of inclusion based on the policy to avoid multiple lawsuits and determine an entire controversy, \textit{i.e.}, “to settle as many related claims as possible in a single action.”\textsuperscript{22} A court should inquire whether the claim and cross-claim both arise from the same interrelated set of facts. A few examples will suffice.

The paradigm case is \textit{Lasa Per L’Industria Del Marmo Society Per Azioni v. Alexander}.\textsuperscript{23} As part of construction of the city hall in Memphis, Tennessee, Italian corporation Lasa supplied marble to subcontractor Alexander. Unpaid, Lasa filed suit against subcontractor Alexander, the prime contractor, the prime contractor’s surety, and the city of Memphis. Alexander then cross-claimed against the other three defendants. The prime contractor then counterclaimed against Alexander and also filed a third-party claim against the architect.\textsuperscript{24}

This conglomeration of claims included subcontracts signed among different parties at different times, resulting in different damages, and involving different evidence on performance

\textsuperscript{21}The defining test for a cross-claim is the same as the defining test for a compulsory counterclaim: the transaction or occurrence. Courts not surprisingly apply the same reasoning to interpret the phrase in both types of cases. \textsc{Wright et al.}, \textit{supra} note 7, § 1432, at 244. What is somewhat surprising is the paucity of cross-claim cases compared with the abundance of compulsory counterclaim cases. Perhaps co-parties are less likely to claim against each other than are opposing parties. Perhaps the stakes are lower since cross-claims are always permissive. Perhaps in many cross-claim cases the litigation is firmly within federal jurisdiction and a defendant is not attempting to bootstrap into federal court through supplemental jurisdiction. Perhaps the dearth of appellate cross-claim decisions simply shows that cross-claims are appropriately a matter of trial court discretion over shaping a litigation.

\textsuperscript{22}\textsc{Wright et al.}, \textit{supra} note 7, § 1431, at 229-30 (collecting cases).

\textsuperscript{23}414 F.2d 143 (6\textsuperscript{th} Cir. 1969).

\textsuperscript{24}\textit{Id.} at 145.
and breach. The district court threw up its hands and disallowed the cross-claims, the
counterclaim, and the third-party claim (treating it as a cross-claim) as not involving the “same
transaction or occurrence.”\footnote{Id.} The Sixth Circuit reversed. In effect, the appeals court asked the
proper question: how many city halls were built? The court began with the recognition that
under the federal rules, “the rights of all parties should be adjudicated in one action,”\footnote{Id. at 146.}
and concluded “[a]lthough different subcontracts are involved, along with the prime contract and
specifications, all relate to the same project and to problems arising out of the marble used in the
erection of the Memphis City Hall.”\footnote{Id. at 147.} All parts of the dispute arose from a single construction
project, which presented a single set of overlapping facts. That is one transaction or occurrence.

One transaction or occurrence is also presented in various other cross-claim situations:
creation of a mortgage and a later buyer’s promise to pay that mortgage involve the same ship,\footnote{Ponce Federal Bank, F.S.B. v. Vessel “Lady Abby,” 980 F.2d 56 (1st Cir. 1992).}
a corporation sued for false registration statements asserts a breach of fiduciary duty against the
individuals responsible for the statements,\footnote{Bernstein v. Crazy Eddie, Inc., 702 F. Supp. 962 (E.D.N.Y. 1988).}
the beneficiaries on six separate insurance policies are all changed at one time,\footnote{Jefferson Std. Ins. Co. v. Craven, 365 F. Supp. 861, 867 (M.D. Pa. 1973) (“To require a
separate trial for one of the six policy disputes would be wholly unrealistic.”}
and employers sued for nonpayment of union pension contributions assert an industry trust fund’s responsibility for the payments.\footnote{Sheet Metal Workers Local 44 v. Scranton Sheet Metal, 881 F. Supp. 959 (M.D. Pa. 1994).}

Even though all these cases
involve separate and distinct legal relationships, and separate evidence, they all involve interrelated facts. Law is irrelevant to the transaction or occurrence.\textsuperscript{32}

Still, too many courts decide joinder of a cross-claim on improper considerations. The most common misconception is that a cross-claim does not arise out of the same transaction or occurrence when it involves a different legal theory.\textsuperscript{33} Other considerations that have been

\textsuperscript{32}WRIGHT ET AL., supra note 7, § 1431, at 240 (“[A cross-claim] can be interposed regardless of its nature. . . . Neither is it relevant that the claim and cross-claim are based on radically different legal theories.”).

\textsuperscript{33}See, e.g., Caton Ridge Nursing Home, Inc. v. Califano, 447 F. Supp. 1222, 1228 (D. Md. 1978) (when authorities moved to de-certify a nursing home from providing medicaid-supported care, a cross-claim for money due for care of the same residents was disallowed because “The issues, both factual and legal, as well as the evidence relevant to them, are distinct from those in the original action.”); Allstate Ins. Co. v. Daniels, 87 F.R.D. 1, 5 (W.D. Okla. 1978) (cross-claim for negligence in accident disallowed in action by insurance company for declaration of non-coverage for same accident because “It cannot be said that the issues of fact necessary to determine the legal questions present in both the original action and the cross-claim are identical.”). One commentary only mildly rebukes this decision by noting “it is possible to conclude that the injured party’s claim of negligence involves a totally different factual investigation . . ..” WRIGHT ET AL., supra note 7, § 1432, at 247. Of course, the proper, harsher question that should have been asked of the court is the same one the court should have posed itself: how many accidents were involved?

Another wrong decision is Mount Vernon Fire Ins. Co. v. A.S. Constr., Inc., 2007 WL 2275242 (E.D.N.Y. Aug. 7, 2007). When homeowners hired a construction company to repair their home, the contractor allegedly damaged the neighbors’ home. The contractor’s insurance company sued the contractor and both sets of homeowners for a declaration of non-liability; the owners of the damaged house cross-claimed against both the contractor and the contracting homeowners. The court dismissed the cross-claims because the “complaint presents an ordinary non-coverage claim based on an exclusionary provision in the policy whereas [the] cross-claim presents a negligence claim . . . and it cannot be said that the issues of fact . . . are identical.” Id. at *4. One construction job. One transaction or occurrence. Law is irrelevant. The facts are not required to be “identical.” To add insult to injury, the court responded to the argument that only one construction job was involved by citing outlandish statements of two earlier decisions of the same court. Various claims involving the condition and rent of one apartment were said to be related “only in the same sense that all the claims arise ultimately from Yetnikoff’s decision to live in Manhattan, or from the fact of his birth.” Yetninoff v. Mascardo, 2007 WL 690135, at *2 (S.D.N.Y. Mar. 6, 2007). In refusing supplemental jurisdiction over a cross-claim asserting that the original claim was a waste of corporate assets, the court disingenuously asserted “At a sufficiently general level, everything is logically related to everything else.” Harry Winston, Inc. v. Kerr, 72 F. Supp. 2d 263, 266 (S.D.N.Y. 1999). True enough, but hardly applicable to the flip side of the case.
improperly used to prevent joinder of a cross-claim are it would complicate the action, it would
hinder enforcement of the public policy supporting the original claim, and it would improperly
extend federal jurisdiction. Other decisions disallowing cross-claims beggar explanation.

1978).

35 See, e.g., SEC v. General Host Corp., 60 F.R.D. 640 (S.D.N.Y. 1973), aff’d, 508 F.2d 1332 (2d

36 Both Danner v. Anskis, 256 F.2d 123 (3d Cir. 1958) and Main v. Festa, 37 F.R.D. 227 (W.D.
Pa. 1965) refused cross-claims for injuries suffered in the same accident that was the subject of
the original claim in large part because of concern that ancillary jurisdiction would expand the
subject matter jurisdiction of the court. Most likely, these two early decisions should be ignored;
they precede 28 U.S.C. § 1367 (2000). The proper attitude—reluctance to delve into state
matters but recognition of avoiding duplicative proceedings—is shown in Miller v. Carson, 515

37 A bad decision is Brandeis Mach. & Supply Corp. v. Campbell, 87 F.R.D. 725 (N.D. Ill. 1980).
The court concluded a claim for enforcement of a promissory note against both a limited
partnership and limited partners did not include as part of the same transaction or occurrence a
cross-claim by a limited partner to void the sale of a partnership interest to him for violation of
state securities law, even though “[t]here is no doubt that the complaint and the cross-claim have
a common element: . . . whether Casine was a validly-formed limited partnership.” Id. at 726.

A worse decision is Design for Business Interiors, Inc. v. Herson’s, Inc., 659 F. Supp.
1103 (D.D.C. 1987). When an automobile dealership remodeled, the original claim involved the
furniture, cabinets, and partitions for the showroom; the proposed cross-claim involved floor tile.
The court baldly declared “the court is presented with two essentially distinct sets of facts” with
the “only apparent connection” that both “are related to Herson’s decoration of its Rockville
showroom.” Id. at 1105. The court brushed aside the argument that “the facts are sufficiently
related to make it judicially economical for the court to hear all the cross-claims” as “not
sufficient to outweigh the fact that the floor tile is wholly unrelated” to the payment for furniture.
Id. One showroom. One redecorating project. Two transactions or occurrences!

The worst decision is Kirkcaldy v. Richmond County Bd. of Educ., 212 F.R.D. 289
(M.D.N.C. 2002). When a former secretary alleged sexual harassment against a school principal,
the board of education terminated him. The secretary sued both the board and the principal. The
principal sought to cross-claim against the board for violation of his civil rights in the
termination. One view of the facts was the principal engaged in sexual harassment and was
properly terminated; the opposite view was he had not engaged in such conduct and was
improperly terminated. Surely this was a single set of facts, but the court reasoned use of the
same witnesses “will differ because their questions will be focused on different periods of time
and different legal theories.” Id. at 296. The court admitted the claims were “necessarily related
to some extent in a causal and chronological way,” yet concluded the claim would “focus on
These decisions miss the point and should be denounced. The only proper consideration is whether the different claims arise from the same transaction or occurrence: interrelated facts that a lay person would expect to have tried together. A cross-claim arising from the same transaction or occurrence is to be allowed; any confusion or prejudice is to be handled by later order for separate trials.\footnote{As with other joinder rules, pleading a cross-claim is routinely to be allowed with possible later severance for separate trials. See \textit{Wright et al., supra} note 7, § 1431. \textit{Fed. R. Civ. P.} 13(i) both reinforces this general policy and also interlocks counterclaims and cross-claims with interlocutory appeals under \textit{Fed. R. Civ. P.} 54(b):}

\begin{quote}
If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or cross-claim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party’s claims have been dismissed or otherwise resolved.
\end{quote}

\begin{quote}
One decision turns a motion to sever upside down by reasoning that the motion under \textit{Fed. R. Ctv. P.} 42(b) “admits that the trial of the plaintiffs’ claims involves factual and legal issues separate from those of the cross-claim.” \textit{Weiss v. Advest, Inc.}, 607 F. Supp. 799, 802 (E.D. Pa. 1984).
\end{quote}

\textbf{C. Permissive Joinder of Parties}

As with cross-claims, the transaction of occurrence is the key requirement for permissive joinder of parties:

\begin{enumerate}
\item[(a)] \textbf{Persons Who May Join or Be Joined.}
\item[(1)] \textbf{Plaintiffs.} Persons may join in one action as plaintiffs if:
\begin{enumerate}
\item[(A)] they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the \textit{same transaction, occurrence, or series of transactions or occurrences}; and
\item[(B)] any question of law or fact common to all plaintiffs will arise in the action.
\end{enumerate}
\item[(2)] \textbf{Defendants.} Persons—as well as a vessel, cargo, or other property subject to admiralty process in rem—may be joined in one action as defendants if:
\begin{enumerate}
\item[(A)] any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the \textit{same transaction, occurrence, or series of transactions or occurrences}; and
\end{enumerate}
\end{enumerate}

\textit{Id.} at 297.
(B) any question of law or fact common to all defendants will arise in the action. 39

1. History and Intent of Federal Rule Language

The history of permissive joinder of parties, and adoption of the “transaction or occurrence” standard, has already been written. 40 While former equity rule 37 governed joinder of parties, the advisory committee did not follow it. The “transaction” and “common question” requirements of the federal rule first appeared in the second draft. 41 The later-added “or occurrence” and “series of transactions or occurrences” were drawn from English and state provisions:

The provisions for joinder here stated are in substance the provisions found in England, California, Illinois, New Jersey, and New York. They represent only a moderate expansion of the present federal equity practice to cover both law and equity actions.

* * *


39Fed. R. Civ. P. 20 (a), (b) [emphasis added]. Of course, the rule additionally requires a common question of law or fact, which is “almost certainly present” when the same transaction or occurrence test is met. See, e.g., MOORE ET AL., supra note 8, § 20.04[1].

40E.g., CLARK, supra note 7, §§ 56-61; MOORE ET AL., supra note 8, § 20App.100; WRIGHT ET AL., supra note 7, § 1651.

41Robert G. Bone, supra note 17, at 106 n. 359.

42Fed. R. Civ. P. 20(a) advisory committee note (1937). For example, the English Rules Under the Judicature Act read as follows:

All persons may be joined in one action as plaintiffs, in whom any right to relief [in respect of or arising out of the same transaction or series of transactions] is alleged to exist, whether jointly, severally or in the alternative, [where if such persons brought separate actions any common question of law or fact would arise . . . .]

The California statutes read as follows:

(a) All persons may join in one action as plaintiffs if:

(1) 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 . . . .
The language was broadened again and again as the committee attempted to draft a rule based on trial convenience and prevention of multiple lawsuits instead of arcane legal distinctions, \(^{43}\) and also to respond to tight-fisted interpretations of party joinder in some code decisions. \(^{44}\)

The end result is a rule of party joinder based on the same intent and policies informing the whole of the federal rules: multiple lawsuits prevention, efficiency, convenience, and trial convenience. \(^{45}\) Remarkably, reporter Charles E. Clark himself thought the permissive joinder of

\begin{verbatim}
(a) All persons may be joined in one action as defendants if there is asserted against them:
   (1) 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 . . ..

The New York statutes read as follows:

All persons may be joined in one action as plaintiffs, in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist whether jointly, severally or in the alternative, where if such persons brought separate actions any common question of law or fact would arise . . ..

All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative . . ..

\end{verbatim}

\(^{43}\) MOORE ET AL., supra note 8, § 20App.100 et seq. (opining that the combination of English rules in essence provided unlimited party joinder (at 8) and that the language of the new federal rule was even broader (at 15); WRIGHT ET AL., supra note 7, § 1652.

\(^{44}\) The notorious case of the times was Ader v. Blau, 241 N.Y. 7, 148 N.E. 771 (1925), which concluded that a boy injured by a defective fence and further injured by medical treatment could not join both defendants in a single action because the facts did not present a single transaction. “[T]he purpose of the Federal Advisory Committee in adding ‘occurrence’ to the joinder of parties rule was to prevent the New York construction from being put on the rule by adopting a phrase different from that which was critical in New York.” Charles A. Wright, Estoppel by Rule: The Compulsory Counterclaim under Modern Pleading, 39 IOWA L. REV. 255, 283 n. 121 (1954).

\(^{45}\) The research assistant in the work of the advisory committee was James W. Moore, later a leading commentator on the rules. Moore opined “The prior federal and state practice reviewed above presents the background for Federal Rule 20, the reasons for its adoption, and points out its intrinsic worth. Restrictive joinder provisions were left in the past. Joinder of parties was treated as a trial problem—not a pleading problem.” MOORE ET AL., supra note 8, § 20App104, at 20App.-19. See also WRIGHT ET AL., supra note 7, §§ 1652, 1653, at 415.
parties rule closely approached free joinder and the only substantial restriction would prove to be the common question requirement, not the transaction or occurrence requirement.\textsuperscript{46}

The rule is based on facts, not historic legal relationships.\textsuperscript{47} Perhaps one treatise states the rule best: “the demands of several parties arising out of the \textit{same litigable event} may be tried together, thereby avoiding the unnecessary loss of time and money to the court and the parties that the duplicate presentation of evidence relating to facts common to more than one demand for relief would entail.”\textsuperscript{48} Another commentator also has it right: “The transaction test in Rule 20(a) made the focal point the cluster of real world events that constituted the social dispute, the

\textsuperscript{46}Clark gave numerous speeches promoting the new rules. In one, he said Rule 20 provides for joinder of parties, and that is the only one of this series that states any restriction at all . . . . It is so broad that it is not so very much of an alternative. It is a requirement that will be fulfilled in any case where anybody would ever think of joinder. You may join parties as plaintiff where there is a common question of law or fact affecting all of them, or you may join parties defendant on the same basis. Charles E. Clark, \textit{Fundamental Changes Effected by the New Federal Rules I}, 15 \textit{Tenn. L. Rev.} 551, 569 (1939). \textit{See also} Bone, supra note 17, at 105 (stating that Clark’s assistant James Wm. Moore also believed the only real restriction was the common question requirement); Charles E. Clark & James Wm. Moore, \textit{A New Federal Civil Procedure II. Pleadings and Parties}, 44 \textit{Yale L.J.} 1291, 1319 (1935).

\textsuperscript{47}“Consistent with other federal joinder provisions, the permissive party joinder rule emphasizes pragmatism; joinder is based not on arcane historic formulations of legal relationships, but on common sense, fact-based considerations.” MOORE ET AL., supra note 8, § 20.02[1][a], at 20-7.

An example may be instructive. Three passengers in a taxicab are injured in an accident. They join together as plaintiffs to sue the taxicab driver, the driver of the other car, and the taxicab company as defendants. This “use of Rule 20 presents a packaging ideal. All interested parties would be joined in a single proceeding, with no threat of inconsistency or the other risks caused by duplicative litigation.” Richard D. Freer, \textit{Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit}, 50 U. PITT. L. REV. 809, 823 (1989). I would also point out that handling all six parties in a single lawsuit involves different legal theories, substantial facts that do not overlap, events at different times, different evidence, and different preclusive effects. None matter because the entire litigation arose from one accident, \textit{i.e.}, one transaction or occurrence.

\textsuperscript{48}WRIGHT ET AL., supra note 7, § 1652, at 397 [emphasis added].
The transaction or occurrence is one litigable event, one cluster of real world events, one set of facts. As with joinder of cross-claims, and joinder of compulsory counterclaims, the proper question is how many events took place?

2. **Logical Relationship Ties Series of Transactions or Occurrences Together**

The intent of the permissive joinder of parties rule is even clearer than the intent of other joinder rules because the joinder of parties rule does not stop with a single transaction or occurrence. The test is “the same transaction, occurrence, or series of transactions or occurrences.” Surely the addition of “series of transactions or occurrences” has added meaning. What is the added meaning? Many courts have opined that a “transaction or occurrence” in the context of a compulsory counterclaim can be recognized when a logical relationship exists between the claim and counterclaim. This gloss is certainly not necessary and hardly helpful; it adds nothing to the words transaction or occurrence. The “logical relationship” gloss may, however, be quite useful in recognizing a series of transactions or occurrences. Another way of saying the same thing is a series of transactions or occurrences is melded together by a logical relationship of overlapping facts.

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49 Bone, *supra* note 17, at 106 n. 360.
50 *See supra* Part II.B.
51 McFarland, *supra* note 6, at 730-32.
52 *Fed. R. Civ. P. 20(a).*
53 *E.g., Moore, supra* note 8, § 13.10[1][b]; *Wright et al., supra* note 7, § 1410, at 52-55.
54 *See* McFarland, *supra* note 6, at 709-14.
A series of transactions or occurrences can be identified in many types of situations. A plaintiff joins multiple defendants whose actions contributed to plaintiff’s injuries even though they did not act in concert or at the same time. Multiple plaintiffs assert a pattern of misconduct by the same defendant. Plaintiff asserts damage against subsequent owners of the plant where he worked. Multiple plaintiffs assert the same wrong perpetrated on them by the

55 See Wright et al., supra note 7, §1653, at 411 (collecting cases). See also United States ex rel. Saunders Concrete Co. v. Tri-State Design Constr. Co., 899 F. Supp. 916 (N.D.N.Y. 1995) (inspector properly joined with supplier of concrete since case against both arose from one concrete pour). Compare McDowell v. Davol, Inc., 2008 WL 271378 (E.D. Tenn. July 10, 2008) (joining products liability theory against medical device manufacturer and negligence theory against surgeon and hospital) with Yates v. Medtronic, Inc., 2008 WL 4016588 (S.D. Ala. Aug. 26, 2008) (refusing joinder of medical device manufacturer with caregivers). In both of these cases, all defendants contributed to a single wrong; that may well be only a single transaction or occurrence; it undoubtedly is a series.

56 E.g., Tridle v. Union Pac. R.R., 2009 WL 1783558 (D. Nebr., June 22, 2009) (identifying series when each plaintiff alleged similar injury from defendant’s work risk factors); Dada v. Wayne Township Trustee’s Office, 2008 WL 2323485 (N.D. Ind., May 30, 2008) (identifying series when plaintiffs fired on successive days involved same time frame, same alleged misconduct, same supervisor); M.K. v. Tenet, 216 F.R.D. 133, 142 (D.D.C. 2002) (“The court concludes that the alleged repeat pattern of obstruction of counsel by the defendants against the plaintiffs is ‘logically related’ as ‘a series of transactions or occurrences’ that establishes an overall pattern of policies and practices aimed at denying effective assistance of counsel to the plaintiffs.”); Geir v. Education Serv. Unit, 144 F.R.D. 680, 688-89 (D. Nebr. 1992) (“although [ ] each of the seven plaintiffs may not have attended the school simultaneously or alleged assaults by the same school employees on the same dates, they nonetheless each assert a right to relief arising out of the same ‘series of transactions or occurrences.’ Specifically, each plaintiff has alleged they [sic] were injured by the same general policy or custom . . . in condoning a pattern of physical, sexual and emotional abuse of students . . .”). Cf. Proctor v. Applegate, 661 F. Supp. 2d 743 (E.D. Mich., 2009) (refusing joinder for similar misconduct of guards at multiple prison facilities but adding dictum that limiting suit to similar misconduct at single facility acceptable).

57 Wright, 36 Minn. L. Rev. at 602 (“[E]mployment at one plant by successive owners is surely a ‘series of transactions or occurrences’ if indeed, it is not a single transaction.”)
same defendant. These are all transactions or occurrences tied together in a logical relationship. This recognition is best summed up by one court:

Imagine a number of ‘transactions or occurrences’ spread out through time and place. They are not directly continuous, or else they would constitute one transaction or occurrence rather than a number of them. What would make them a ‘series?’ The answer is some connection or logical relationship between the various transactions or occurrences. The thing which makes the relationship ‘logical’ is some nucleus of operative facts or law—the second prong of the 20(a) test. If the phrase ‘series’ is to have any real meaning whatsoever, it necessarily must entail some ‘logical relationship’ between the specific transactions or occurrences. Thus, Rule 20 itself contemplates a ‘logical relationship’ definition."

Finally, a worthwhile use of gloss. In all these cases, the courts recognize the logical relationship tying a series of transactions or occurrences together and apply the intent and policy of the permissive joinder rule by allowing the joinder.

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59Hanley v. First Investors Corp., 151 F.R.D. 76, 80 (E.D. Tex. 1993) (recognizing “common pattern of claims alleging the same culpable conduct against the same defendant over the same period of time. The claims are much more similar than dissimilar.”).

60While a court should be generous in recognizing a series of transactions or occurrences, it can properly decline to find a series when there is no factual overlap. E.g., Coughlin v. Rogers, 130 F.3d 1348 (9th Cir. 1997) (49 plaintiffs sued for delay in naturalization proceedings but did not claim common pattern of conduct by defendant); Lover v. District of Columbia, 248 F.R.D. 319 (D.D.C. 2008) (plaintiff sought to add others who suffered similar but separate rights violations by police over more than a year without allegation of connection or pattern of conduct); Harris v. Spellman, 150 F.R.D. 130 (N.D. Ill. 1993) (two inmates challenged discipline imposed on them for separate incidents related only because they happened at same prison).

Other cases refuse to find a transaction or occurrence and end analysis at that point; they give no consideration to whether the facts present a series of transactions or occurrences that would profitably be retained in a single suit. E.g., Deskovic v. City of Peekskill, 673 F. Supp. 2d 154 (S.D.N.Y. 2009) (exonerated inmate attempted to join defendants who had participated in his conviction and guard who had abused him in prison); United States v. Katz, 494 F. Supp.2d
The logical relationship gloss on the transaction or occurrence can probably be traced to a pre-rules case in which the Supreme Court famously said “‘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.” 61 Most quotes end there. The next sentence is “The refusal to furnish the quotations is one of the links in the chain which constitutes the transaction . . . .” 62 The concept of links in the chain is a good way to think about a series of transactions or occurrences. The Supreme Court later recognized as much. 63

3. Permissive Joinder Shrinks Over the Years

The original intent of permissive joinder to allow almost free joinder of parties was part and parcel of the overall philosophy of the federal rules to handle all aspects of a dispute in one proceeding; the words of the rule were carefully chosen for this purpose. 64 Despite this clear intent, over the years courts have more and more seized on the words of the rule for exclusion

62 Id. at 610.
64 See supra Part II.A.

645 (S.D. Ohio 2006) (joinder refused because fraudulent conveyances separate and distinct even though all involved cleanup of one hazardous site); Wynn v. National Broadcasting Co., 234 F. Supp.2d 1067 (C.D. Cal. 2002) (joinder of multiple plaintiffs for industry-wide age discrimination against multiple defendants refused); Coalition for a Sustainable Delta v. U.S. Fish & Wildlife Serv., 2009 WL 3857417 (E.D. Cal., Nov. 17, 2009) (refusing joinder of several defendants whose separate actions affected fish but then reaching same result by ordering coordination of separate cases for case management to avoid waste of judicial resources); Boschert v. Pfizer, Inc., 2009 WL 1383183 (E.D. Mo., May 14, 2009) (refusing joinder of four plaintiffs who each took same drug obtained from different providers).
rather than for inclusion of additional parties; they continue to “be skeptical of a natural unity to
disputes.”

The courts started well in *Mosley v. General Motors Corp.* Ten plaintiffs sued on
behalf of themselves and all others similarly situated for racial discrimination practices by their
employer. The court of appeals recognized “a company-wide policy purportedly designed to
discriminate against blacks in employment similarly arises out of the same series of transactions
or occurrences.” The court also wrote of the proper attitude in joinder of parties cases:

> The purpose of the rule is to promote trial convenience and expedite the final
determination of disputes, thereby preventing multiple lawsuits. . . . Single trials
generally tend to lessen the delay, expense and inconvenience to all concerned.
Reflecting this policy, the Supreme Court has said:

> Under the Rules, the impulse is toward entertaining the broadest possible scope of
action consistent with fairness to the parties; joinder of claims, parties and
remedies is strongly encouraged.

The court of appeals recognized “[a]bsolute identity of all events is unnecessary” since “all
‘logically related’ events entitling a person to institute a legal action against another generally are
regarded as comprising a transaction or occurrence” All of this language was appropriate and
helpful. Indeed, for many years every permissive joinder of parties decision routinely cited
*Mosley*, and it remains the leading case today. The problem is that the opinion is thin, and the
courts citing it frequently only quote the general language defining transaction while they
proceed to ignore both the result of the case and the attitude toward broad joinder.

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65 Bone, *supra* note 17, at 106 n. 360.

66 497 F.2d 1330 (8th Cir. 1974).

67 *Id.* at 1334.


69 *Id.* at 1333.
To be sure, many decisions demonstrate an appropriately generous attitude toward party joinder. Unfortunately, far more are hostile to party joinder—and thus to the general philosophy of the federal rules. How else to explain decisions based on inappropriate considerations?

Lower courts keep making restrictive joinder of parties decisions and the drafters of the rules keep amending to eliminate these restrictive interpretations. While raw numbers are a crude measure, they can be instructive. The main volume of a leading treatise on federal procedure collects 35 cases interpreting the transaction or occurrence requirement in permissive joinder

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71E.g., Burns v. Western S. Life Ins. Co., 298 F. Supp. 2d 401 (D.W. Va. 2004) (refusing joinder of plaintiffs against insurance company and agents for selling same fraudulent product based on separate misrepresentations at different times); Pena v. McArthur, 889 F. Supp. 403 (E.D. Cal. 1994) (denying joinder of driver and insurance carrier for bad faith defense for same accident); Campbell v. James, 263 S.W.2d 402 (Mo. 1954) (refusing joinder of defendants in single blasting incident because of different insurance contracts).

72E.g., Don King Productions, Inc. v. Colon-Rosario, 561 F. Supp. 2d 189, 192, 193 (D.P.R. 2008) (joinder of action against pirates of television signal for same events denied because of “prejudice and delay it would put on the Court’s shoulders” and “unmanageable administrative problems in the clerk’s office”); Insolia v. Philip Morris Inc., 186 F.R.D. 547, 551 (W.D. Wisc. 1999) (joinder of smokers against tobacco company denied because of possible jury confusion).

73Just as courts made restrictive joinder decisions under the codes, see supra note 44, courts made restrictive joinder decisions under the even broader joinder provisions of the new rules. The permissive joinder of parties rule, FED. R. CIV. P. 20(a), was amended in 1966, along with other joinder rules to “root out remnants of the old formalistic approach that had crept into application of the 1938 rules.” Freer, supra note 47, at 815. See also WRIGHT ET AL., supra note 7, § 1655, at 420.
cases: 10 courts conclude the requirement is satisfied, and 25 courts conclude not.\textsuperscript{74} Even more startling is the most recent supplement to the same treatise; the number of cases concluding the facts constitute the same transaction, occurrence, or series of transactions or occurrences is zero; the number of cases concluding the opposite is 28.\textsuperscript{75} The convenience and economy of joinder that could be achieved in many of these 28 cases is readily apparent.\textsuperscript{76}

4. Case Studies of Satellite Television Joinder Cases

In recent years, several courts have considered whether to allow a cable or satellite television provider to join as defendants multiple entities or individuals who have pirated the same broadcast signal. One case allows joinder.\textsuperscript{77} A dozen others deny permissive joinder, reasoning that the pirates did not act in concert or that joinder would cause confusion and additional expense.\textsuperscript{78}

\textsuperscript{74}WRIGHT ET AL., supra note 7, § 1653, at 401 n. 2, 404 n. 5.

\textsuperscript{75}WRIGHT ET AL., supra note 7, § 1653 (2010 supp.).


The situation of multiple parties who have each acted independently does appear to present separate transactions. Yet none of these courts consider that the defendants have all acted to injure the same plaintiff by stealing the exact same product. The factual grouping could be considered the television broadcast, not the individual acts of pirating. Even if that grouping is not accepted, the rule allows joinder of a “series of transactions or occurrences.” None of these decisions considers that portion of the rule. If this scenario does not present a series of interrelated transactions or occurrences, what meaning remains for series? Certainly, multiple acts stealing the same broadcast signal from the same provider is a factually interrelated series of transactions or occurrences.

The same result should be reached when the policies behind permissive joinder are considered. The policy of permissive joinder is to join all parties when possible; any problem of joinder should be considered a trial convenience problem, not a pleading hurdle.79 “The purpose . . . is to make ‘one lawsuit grow where two grew before.’”80 Denying joinder of 1795 defendants purloining the same signal from the same plaintiff makes 1795 suits grow where one grew before. True enough, handling all defendants in one suit will present management issues; that should be weighed against hundreds of separate lawsuits each starting over with the same pleadings and proof of the same acts. The courts would do far better to follow the reasoning of the one case that approved joinder.81

79See supra Part II.A.

80Wright, Joinder, supra note 15, at 580.

81DIRECTV v. Barrett, 220 F.R.D. 630 (D. Kan. 2004). The court recognized that other federal district courts uniformly deny joinder in similar cases (Id. at 632), but considered the overlapping evidence, duplication of testimony, delay, inconvenience, and expense that separate trials would generate (Id. at 631) in concluding “In each case, the records and other information that serve as the basis of DIRECTV’s claims arise from the same investigations and raids. DIRECTV will
In summary, the drafters of the permissive joinder rule selected “transaction, occurrence, or series of transactions or occurrences” as terms of inclusion to lead to nearly free joinder of parties. When the transaction or occurrence is properly interpreted as fact-based, permissive joinder cases will be decided in line with the general policies of the rules. One has to search long and hard for a decision that may have too generously allowed permissive joinder. 82 This suggests that courts should approve permissive joinder almost as a matter of course.

D. Additional Claims Under Rule 14

A defending party is allowed to bring a third-party claim against a person “who is or may be liable to it for all or part of the claim against it.” 83 Since the test does not employ the transaction or occurrence, the standard third-party claim is not part of this article. The rule continues, however, into an area that is germane; the third-party defendant may assert directly against the original plaintiff “any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.” 84 And the original plaintiff may assert directly against the third-party defendant “any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party

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82 One rare decision may be Pennsylvania Employees Benefit Trust Fund v. Eli Lilly & Co., 2007 WL 2916195 (E.D. Pa., Oct. 5, 2007) (insurance company alleged three defendants separately and without conspiracy or action in concert each marketed its own product deceptively so that insureds purchased them and submitted claims for reimbursement).


plaintiff.”\textsuperscript{85} Sometimes these claims are loosely termed counterclaims or cross-claims, but a better term is rule 14 claim.\textsuperscript{86}

As with other joinder devices, the key requirement for a rule 14 claim is the transaction or occurrence, which again "is to avoid circuity of action and multiplicity of suits."\textsuperscript{87} So too the method of identifying the transaction or occurrence in rule 14 claims is similar, which is that the proposed claim "involves some of the same evidence, facts, and issues as does the original action so that litigation economy will result from allowing it to be added to the lawsuit."\textsuperscript{88} Again, the court should look to the facts–not the legal theories–of the litigation.

The archetypal rule 14 claim case is \textit{Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co.}\textsuperscript{89} Revere decided to build a manufacturing plant for metals; Fuller entered into contracts to construct the plant, and Aetna executed bonds to secure the performance of Fuller. When Revere sued on the bonds against Aetna, Aetna brought Fuller in as a third-party defendant because of its agreement to indemnify Aetna. Third-party defendant Fuller in turn brought a rule 14 claim against plaintiff Revere for breach of warranty and negligence.\textsuperscript{90} The court swept aside arguments that different contracts and different bodies of law were involved in its focus on the facts of the dispute: ""The theory adopted in the new rules . . . has been that the ‘transaction’ or ‘occurrence’ is the subject matter of a claim, rather than the legal rights arising therefrom;

\begin{itemize}
  \item \textsuperscript{85}Fed. R. Civ. P. 14(a)(3).
  \item \textsuperscript{86}WRIGHT ET AL., \textit{supra} note 7, \S 1458.
  \item \textsuperscript{87}WRIGHT ET AL., \textit{supra} note 7, \S 1458, at 446.
  \item \textsuperscript{88}WRIGHT ET AL., \textit{supra} note 7, \S 1458, at 446-47.
  \item \textsuperscript{89}426 F.2d 709 (5\textsuperscript{th} Cir. 1970).
  \item \textsuperscript{90}Id. at 710-11.
\end{itemize}
additions to or subtractions from the central core of fact do not change this substantial identity . . ..”91 As had the court in the leading cross-claim case,92 the court properly recognized that all claims arose from a single construction project: “It is easily seen that Fuller’s claim arises out of the aggregate of operative facts which forms the basis of Revere’s claim in such a way to put their logical relationship beyond doubt. The two claims are but two sides of the same coin.”93

Focus on a single event is often helpful in identifying the related facts that constitute a single transaction or occurrence. For example, the collision of two boats allows joinder of parties, a cross-claim, a counterclaim, a third-party claim, and a rule 14 claim back against the plaintiffs because all of the joined claims arise from a single boating collision even though the legal theories of the various claims differ greatly.94 And a rule 14 antitrust claim is allowed against a plaintiff proceeding on a breach of contract theory because both claims arise from the “same basic controversy between the parties.”95

Even concentration on a single event may be too narrow to bound a transaction or occurrence. A better boundary may be the whole of the continuing relationship among parties. When plaintiff corporation sued defendant bank for negligently permitting one of plaintiff’s managers (Kerr) to draw checks on plaintiff’s account payable to the manager’s controlled corporations, the bank asserted a third-party claim against the manager and the controlled

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91 Id. at 713, quoting Clark v. Taylor, 163 F.2d 940, 942 (2d Cir. 1947).


93 Revere Copper, 426 F.2d at 715-16.


corporations; the third parties in turn filed a rule 14 claim against the plaintiff for services
rendered in establishing and managing a branch office for plaintiff.\textsuperscript{96} The court had no difficulty
recognizing the common transaction or occurrence:

Viewed in their totality, we think the Kerr claims must be regarded as arising out of the
transaction or occurrence that is the subject of the plaintiff’s claim. The transaction
involved was the establishment of the Philadelphia office, Kerr’s appointment as
manager, and his conduct in respect to the management of the office. . . . The issue, then,
will be the propriety of any payments to Kerr for services. The counterclaims [rule 14
claims] are claims for additional services rendered by Kerr and allegedly unpaid. We
regard the ‘transaction’ as being the whole relationship between plaintiff and Kerr and
hence we conclude that, if otherwise maintainable, the Kerr claims fall within the ambit
of Rule 14.\textsuperscript{97}

Few reported decisions include rule 14 claims. Those few cases properly identify the
same transaction or occurrence as a common set of facts, often seen because the facts cluster
around a single common event.\textsuperscript{98}

III. PLEADING

1962).

\textsuperscript{97}Id. at 172. In contrast is Finkel v. United States, 385 F. Supp. 333 (S.D.N.Y. 1974). Taxpayers
sued to cancel a tax penalty against a corporation. The government counterclaimed against the
two taxpayers and also impleaded another person alleged to be in control of the corporation. The
third-party defendant sought to bring a rule 14 claim against the two plaintiffs for
indemnification for taxes of the corporation, and plaintiffs argued the indemnification was
invalid for fraud. One corporation, one tax liability, and the court failed to find a “logical
relationship,” or more appropriately the same transaction or occurrence, because the main
dispute dealt with control of the corporation and the rule 14 claim dealt with fraud. Not as
obviously wrong, but still clearly outside the policies of the rule is Brown v. First Nat’l Bank, 14
F.R.D. 339 (E.D. Okla. 1953). Plaintiff depositor sued defendant bank to recover money paid
out of an escrow account to another. The bank impleaded the recipient of the funds. The third-
party recipient filed a “cross-claim” [rule 14 claim] against the original plaintiff for an
accounting of their partnership. The court concluded that the evidence of the original claim
would have “no factual relation to the evidence in the other,” [id. at 341] even though all sought
the same funds.

\textsuperscript{98}See generally WRIGHT ET AL., supra note 7, §§ 1458-59.
The interlocking of the rules can also be seen in pleading. Both joinder and pleading under the rules grow out of the recognition that “it is not differing legal theories, but differing occurrences or transactions, which form the basis of separate units of judicial action.”

A. Pleading a Claim

A person seeking relief is required to plead “a short and plain statement of the claim showing that the pleader is entitled to relief.” The rule does not use the ubiquitous “transaction or occurrence.” Yet the symbiotic relationship between the “claim” and the “transaction or occurrence” is readily apparent from even a brief history surrounding the drafting of the federal rules.

In practice under the codes prior to the federal rules, a continuing controversy developed over the meaning of “cause of action.” Some scholars, including Professor O. L. McCaskill, argued a cause of action was the intersection of a legal right and a legal duty. This view of the cause of action was essentially identical to “right of action,” and was law-based. Other scholars, including Professor Charles E. Clark, argued a cause of action was a grouping of facts

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102 O. L. McCaskill, Actions and Causes of Action, 34 YALE L.J. 614, 638 (1925): “It is that group of operative facts which, standing alone, would show a single right in the plaintiff and a single delict to that right giving cause for the state, through its courts, to afford relief to the party or parties whose right was invaded.”

103 “[W]hen a legal right is wrongfully infringed, there accrues to the injured party a right to obtain the legal remedy by action against the wrongdoer. This secondary or remedial right is called a right of action.” GEORGE L. PHILLIPS, CODE PLEADING § 186, at 168 (2d ed. 1932). Right of action means “the right to prosecute an action with effect.” Jacobus v. Colgate, 111 N.E. 837, 839 (1916).
that a lay person would expect to try together.\textsuperscript{104} This view of the cause of action was fact-based. As reporter of the advisory committee that wrote the Federal Rules of Civil Procedure, Clark cemented his view of the proper litigation unit into rules practice by assigning “cause of action” to the ash heap of history and replacing it with the brand-new (and therefore unglossed) term “claim for relief.”\textsuperscript{105}

The claim is entirely fact-based and fact-defined. Accordingly, its close relationship with the transaction or occurrence, also fact-based and fact-defined, is readily apparent.\textsuperscript{106} This is no accident. Both are integral to the procedural philosophy embodied throughout the federal rules.

\begin{footnotesize}
\begin{enumerate}
\item[104] Clark, supra note 7, § 12, at 143: “The essential thing is that there be chosen a factual unit, whose limits are determined by the time and sequence and unity of the happenings, rather than by some vague guess or prophecy of potential judicial action.” In other words, a cause of action was “such a group of facts . . . limited as a lay onlooker would to a single occurrence or affair, without particular reference to the resulting legal right or rights.” Id. at 130.

\item[105] Because of its illusive character, [the cause of action] has been entirely omitted from the new rules; but a similar idea is conveyed. . . . These rules make the extent of the claim involved depend not upon legal rights, but upon the facts, that is, upon a lay view of the past events which have given rise to the litigation. Charles E. Clark, Cases on Pleading and Procedure 658-59 (2d ed. 1940) (citations omitted).

The replacement of cause of action with claim was not a minor matter of semantics. The Supreme Court recognized its importance when it went out of its way to replace the old test for pendent jurisdiction, based on the cause of action, with a new test of “common nucleus of operative fact” for pendent jurisdiction, based on the claim. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). The Court recognized the earlier debate between McCaskill and Clark, id. at 722 n. 7, and decisively took the side of Clark and the new federal rules: “[u]nder the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” Id. at 724. This test has in turn been replaced with the largely, if not completely, synonymous statutory standard of “same Constitutional case under Article III.” 28 U.S.C. § 1367(a) (2000).

\item[106] Clark himself defines “transaction” in almost identical terms to the claim: “Conceivably, ‘transaction’ might include all those facts which a layman would naturally associate with or consider as being a part of, the affair, altercation, or course of dealings between the parties.” Clark, supra note 7, § 102, at 655.
\end{enumerate}
\end{footnotesize}
of a grouping of facts as the defining unit of litigation, the primacy of substantive law over procedure, promotion of trials on the merits, and achieving economy and efficiency in civil procedure by resolving all aspects of a single litigation unit in a single lawsuit. ¹⁰⁷

Courts, commentators, and attorneys that today continue to define procedural concepts by law instead of by fact, usually by employing the obsolete “cause of action,” fail to recognize the “one suit fits all” unity of the individual case and the interlocked unity of the federal rules system. This failure leads to narrow, nitpicking decisions that do harm to procedure in multiple areas, including pleading, joinder, preclusion, and jurisdiction. ¹⁰⁸

B. Pleading in Different Counts

While the “claim” defines the basic litigation unit in pleading, the “transaction or occurrence” does appear in two places in the pleading rules. The first of these rules is obscure and seldom litigated, but it has instructive value because it draws together both concepts and demonstrates how the federal rules are supposed to work. This first rule bringing the two together instructs a pleader when to plead in separate counts:

A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a separate count or defense. ¹⁰⁹

¹⁰⁷ E.g., CLARK, supra note 7, § 12, at 60 (“[T]he lawsuit is to vindicate rules of substantive law, not rules of pleading, and the latter must always yield to the former.”); Clark, supra note 13, at 297 (procedure rules to be “continually restricted to their proper and subordinate rule” to substantive rules). See Bone, supra note 17, at 100; Smith, supra note 17, at 916; Subrin, supra note 17, at 962; Wright, supra note 44, at 275.

¹⁰⁸ See infra Parts III.B-C (discussing pleading); supra Part II (discussing joinder devices); McFarland, supra note 5 (discussing compulsory counterclaims); infra Part IV (discussing interlocutory appeal in multiple claim cases); infra Part V discussing briefly preclusion and supplemental jurisdiction).

¹⁰⁹ FED. R. CIV. P. 10(b) [emphasis added].
Once again, the claim is employed as part of the effort to obliterate the cause of action.\textsuperscript{110} And once again, interpretation under the rule depends on proper understanding of a “claim” as a grouping of facts, not a legal theory.\textsuperscript{111} A recent decision stated this with economy and precision: “One set of facts producing one injury creates one claim for relief, no matter how many laws the deeds violate.”\textsuperscript{112}

This rule reinforces the understanding of a claim as a factual grouping by adding that only claims founded on separate transactions or occurrences need be pleaded in separate counts. Probably this is a redundancy: separate factual groupings, \textit{i.e.}, separate transactions or occurrences, are different claims, and a single factual grouping is the same transaction or occurrence, \textit{i.e.}, the same claim. If so, the redundant parts are consistent and the repetition is harmless. One set of facts is one claim is one transaction or occurrence.

\textsuperscript{110}WRIGHT ET AL., \textit{supra} note 7, § 1324, at 401:

In conjunction with the other pleading provisions, this part of Rule 10(b), which is envisioned as promoting a story-telling type of pleading that is informal in composition and unhampered by the formalistic concept of a ‘cause of action’ that was required to be set forth under former practice, was another of the federal rule innovations designed to achieve clarity and simplicity in the pleadings.

\textsuperscript{111}See, \textit{e.g.}, Original Ballet Russe, Ltd. v. Ballet Theatre, Inc., 133 F.2d 187, 189 (2d Cir. 1943) (stating the single claim was the destruction of plaintiff’s business and not the separate and distinct tort theories asserted by plaintiff):

For the traditional and hydraheaded phrase ‘cause of action’ the Federal Rules of Civil Procedure have substituted the work [sic] ‘claim.’ It is used to denote the aggregate of operative facts which give rise to a right enforceable in the courts. \textit{See also} WRIGHT ET AL., \textit{supra} note 7, § 1324, at 403; \textit{supra} Part III.A.

\textsuperscript{112}Orthodontic Centers of Ill., Inc. v. Michaels, 407 F. Supp. 2d 934, 936 (N.D. Ill. 2005). This quotation is borrowed from NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 292 (7\textsuperscript{th} Cir. 1992) (denying appealability under \textsc{Fed.} R. \textsc{Civ.} P. 54(b) of separate “claims”). \textit{See infra} Part IV.
One case will illustrate both the correct approach to this rule and the problem faced by federal judges sitting in code states. In *Tompkins v. Central Laborers’ Pension Fund*, plaintiff pleaded two alternative “causes of action” (wrongful suspension of pension benefits and deficient notice of the rules for suspension of benefits) in a single count. Defendant moved to dismiss under rule 10(b) for failure to plead in separate counts, and argued to the magistrate judge that the rule required each legal theory be pleaded in a separate count. The magistrate judge agreed! The district judge disagreed: “the language of Rule 10(b) clearly requires only that claims under ‘separate transactions or occurrences’ be set forth in separate counts.”

The court also identified the problem behind such thinking: federal courts sitting in states with state code systems are beset with motions having substance in state court but improper under the federal rules:

Putting each legal theory in a separate count is a throwback to code pleading, perhaps all the way back to the forms of action; in both, legal theory and facts together created a ‘cause of action.’ The Rules of Civil Procedure divorced factual from legal aspects of the claim and replaced ‘cause of action’ with ‘claim for relief’ to signify the difference.

Some courts recognize that rule 10(b) motions are almost always improperly based on code practice and slice through them. Other courts fail to recognize the difference and issue code motions.

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113 2009 WL 3836893 (C.D. Ill., Nov. 16, 2009).

114 Id. at *3. Stating different legal theories arising from the same transaction or occurrence is not inappropriate under the federal rule when helpful to understanding of the pleading, but it certainly is not required. WRIGHT ET AL., supra note 7, § 1324, at 410-12.


116 E.g., Rossario’s Fine Jewelry, Inc. v. Paddock Publications, Inc., 443 F. Supp. 2d 976, 977-78 (N.D. Ill. 2006) (bemoaning “mistaken practice of carving up a single claim (which is the relevant concept in federal pleading) by setting out different theories of recovery in different counts,” and tracing practice to “pervasive” state court code practice); Orthodontic Centers of Ill., Inc. v. Michaels, 407 F. Supp. 2d 934, 935 (N.D. Ill. 2005) (“As common as the very different usage drawn from other sources and legal cultures may be, the concept of a separate
decisions under the federal rule. As with other rules, courts interpreting federal rule 10(b) should flatly reject motions steeped in the philosophy of the codes and interpret the rule with the overall inclusive philosophy of the federal rules in mind.

C. Relation Back of Amendments

The transaction or occurrence is also found in the pleading rules as the test for when an amendment to a pleading will relate back:


118 When 51 named plaintiffs lost their jobs during the changeover in management of a restaurant, they sued for different forms of discrimination. Bautista v. Los Angeles County, 216 F.3d 837 (9th Cir. 2000). The district court dismissed the second amended complaint with prejudice for failure to plead each plaintiff’s claim in a separate count. This decision was clearly wrong under FED. R. CIV. P. 10(b); the rule requires separate claims, which these were since each plaintiff had an individual claim, to be pleaded in separate counts only when based on more than one transaction or occurrence. The changeover of management was a single transaction or occurrence. Two of the three judges on the appellate panel approved the district court’s interpretation of the rule, but reversed for failure to grant leave to amend. Only one judge seemed to recognize that all plaintiffs were suing on a single set of facts. Beyond that, the advantage of handling all plaintiffs together in a single litigation unit was apparent. The concurring judge pointed this out:

[S]ometimes even the best and brightest of us fails to see the forest for the trees. We sometimes overlook the reason for the Rules’ existence and examine a complaint with the eyes of a laboratory technician rather than with those of a dispenser of justice. Id. at 844 (Reinhardt, J., concurring).
When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitation allows relation back;
(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading . . ..

As with the other areas where transaction or occurrence is encountered, the proper search is for a common set of facts.

Courts have attempted to get at the meaning of “conduct, transaction, or occurrence” through various glosses, including “core of operative facts,” common core of operative facts, same operational facts, same “factual nexus,” and “gist of the action.” These glosses, since they focus on the facts of the case, are relatively harmless. Yet the question

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119 Fed. R. Civ. P. 15(c)(1) [emphasis added]. As can be seen, the rule adds “conduct” to the familiar transaction or occurrence. This word should broaden the reach of the phrase, but the cases pay little if any attention to this addition.

120 “As is true in a number of other contexts, such as compulsory counterclaims, cross-claims, and certain third-party claims, the search under Rule 15(c) is for a common core of operative facts in the two pleadings.” Wright et al., supra note 7, § 1497, at 85.

121 E.g., Mayle v. Felix, 545 U.S. 644, 659 (2005). The Court also writes of “the same core facts,” id. at 657, “each separate congeries of facts,” id. at 661, and “a common core of operative facts,” id. at 664.


126 Others glosses are harmful as they draw the court’s attention away from the facts of the case to inappropriate considerations such as whether the same evidence applies to both pleadings or whether the measure of damages is the same. See Wright et al., supra note 7, § 1497, at 102 (collecting and criticizing cases).
arises again: why any gloss at all? The intent of the rule is that when the proposed amendment
arises from the same facts as the original pleading, the amendment relates back. The best
language for expressing that concept is the rule language itself, “same conduct, transaction, or
occurrence.”

As in other areas, the test is entirely one of facts, not law. Changing legal theories on the
same facts is not important:

127 Fed. R. Civ. P. 15(c)(1)(B). See Wright et al., supra note 7, § 1497, at 103 (best words to
describe “the parameters of the relation back doctrine and focusing on its underlying policies”
are the words of the rule itself).

Some courts have created an additional gloss on the rule out of the whole cloth.
“[A]lthough not expressly mentioned in the rule, the courts also inquire into whether the
opposing party has been put on notice regarding the claim or defense raised by the amended
pleading.” Wright et al., supra note 7, § 1497, at 85 (collecting cases). These courts reason
notice preserves the purpose of the statute of limitations to prevent stale claims. This reasoning
is a straw man. The plaintiff pleads facts that give rise to a claim for relief. Later, plaintiff
wishes to amend. The amendment relates back when it arises from the same “conduct,
transaction, or occurrence,” which means from the same set of facts. The original complaint
places the defendant on notice of the set of facts, and therefore of all possible legal theories
based on that set of facts. When an amendment meets the standard for relation back, notice to
the opposing party should be considered automatic. “[T]he adverse party, viewed as a
reasonably prudent person, ought to have been able to anticipate or should have expected that the
character of the originally pleaded claim might be altered or that other aspects of the conduct,
transaction, or occurrence set forth in the original pleading might be called into question.”
Wright et al., supra note 7, § 1497, at 93.

The search for notice appears once again to trace back to code practice and common law,
when plaintiff was required to set forth the legal theory of a complaint. Consideration of notice
was then appropriate. Today plaintiff is required to plead only a set of facts that may give rise to
multiple legal theories. Consideration of notice is irrelevant. Inserting notice into the ruling
sometimes produces the same result as would staying true to the rule. E.g., Slayton v. American
Express Co., 460 F.3d 215, 228 (2d Cir. 2006) (allowing relation back of amendment to render
“prior allegations more definite and precise,” even though opining “central inquiry is whether
adequate notice” given). Cf. Rosenberg v. Martin, 478 F.2d 520, 526 (2d Cir. 1973) (refusing
relation back of amendment to add assault to slander when “not a word in the complaint even
suggested a claim of physical assault,” even though asserting “the test is not contemporaneity but
rather adequacy of notice.”). Sometimes it results in spectacularly wrong decisions. E.g.,
Meijer, Inc. v. Biovail Corp., 533 F.2d 857 (D.C. Cir. 2008) (refusing relation back of
amendment adding decision not to market own generic drug to preventing competitor’s
marketing of generic drug as violation of antitrust law); Moore v. Baker, 989 F.2d 1129 (11th Cir.
1993) (refusing relation back of amendment changing theory from lack of informed consent to
The fact that an amendment changes the legal theory on which the action initially was brought is of no consequence if the factual situation upon which the action depends remains the same and has been brought to defendant’s attention by the original pleading. Thus, an amendment may set forth a different statute as the basis of the claim, or change a common law claim to a statutory claim, or vice-versa, or shift from a contract theory to a tort theory, or delete a negligence count and add or substitute a claim based on warranty, or change an allegation of negligence in manufacture to continuing negligence in advertising. Indeed, an amendment that states an entirely new claim for relief will relate back as long as it satisfies the test embodied in the first sentence of Rule 15(c). 128

Courts that look to the facts that form the “conduct, transaction, or occurrence) reach sound results. 129 Courts that treat legal theories as claims botch the result. 130 Proper understanding of “claim”—and its interlocking with “transaction or occurrence”—as a set of facts is essential to proper ruling on relation back of an amendment.

128 WRIGHT ET AL., supra note 7, § 1497, at 97-99 (collecting cases). Changing a legal theory on the same facts is not only allowed but also can be used to cure a defective complaint. WRIGHT ET AL., supra note 7, § 1497, at 84 n. 15. See, e.g., Drakatos v. R.B. Denison, Inc., 493 F. Supp. 942, 945 (D. Conn. 1980) (replacing tort and contract claim with admiralty claim).


Some of these decisions loosely refer to addition of “claims” instead of different theories on the same claim, but reach the proper result by concentrating on the facts. E.g., Travelers Ins. Co. v. 633 Third Assoc. 14 F.3d 114 (2d Cir. 1994) (adding “claims” of waste and breach of contract to “claim” for fraudulent conveyance);

130 E.g., McGregor v. Louisiana State U. Bd. of Supervisors, 3 F.3d 850 (5th Cir. 1993) (refusing to allow due process “claims” to be added to rehabilitation act “claims” all arising from actions of law school toward disabled student); Acker v. Burlington N. & Santa Fe Ry., 215 F.R.D. 645 (D. Kan. 2003) (allowing addition of “cause of action” for trespass to land to “claim” for negligence on “factual allegations virtually identical” but denying addition of allegation of facts of improper design and construction of bridge as separate “claims,” even though all facts related to plaintiff’s attempt to collect damages for single flood); Pendrell v. Chatham College, 386 F. Supp. 341 (W.D. Pa. 1974) (refusal by judge clearly hostile to federal procedure system to allow plaintiff to add civil rights violation to complaint for defamation and trespass for same termination because rule “does not permit lawyers to endlessly answer the question: How many causes of action can you find in this fact situation?”).
Courts are able to discern the same conduct, transaction, or occurrence when the original pleading and the amended pleading both involve a single, overarching event or relationship. One job event is one set of facts. One job interrelates one set of facts even when acts take place over a period of time. One pattern of continuing conduct by defendant is one set of interrelated facts. One event or deal between the parties is one set of facts. One tortious event is one set of interrelated facts.

When plaintiff sues for discrimination and wishes to amend to add a theory of later retaliation, the amendment relates back. E.g., Perry v. American Airlines, Inc., 405 F. Supp. 2d 700, 704 (E.D. Va. 2005) (holding retaliation “arose out of the ‘conduct, transaction, or occurrence’ which was at the heart of his original complaint, namely his discharge); Davis v. University of Chicago Hosp., 158 F.R.D. 129, 131 (N.D. Ill. 1994) (retaliation arose from original discrimination since “[i]f not for the alleged discrimination, there would be no EEOC charge. If not for the EEOC charge, there would be no retaliation.”). The opposite is also true. See Jones v. Greenspan, 445 F. Supp. 2d 53, 56-57 (D.D.C. 2006) (allowing amendment alleging discrimination to original pleading alleging retaliation because “close relationship between the allegations of discriminatory non-promotion and the alleged retaliation . . . make them part of a ‘common core of operative facts’”). But see Marsh v. Coleman Co., Inc., 774 F. Supp. 608, 613 (D. Kan. 1991) (refusing relation back of allegation of fraud during employment to original complaint alleging age discrimination in termination since action of employer “substantially different in kind or time.”).

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See, e.g., FDIC v. Conner, 20 F.3d 1376 (5th Cir. 1994) (approving relation back of amendment adding additional bad loans to original complaint asserting same type of conduct by defendants); Scott v. Fairbanks Capital Corp., 284 F. Supp. 2d 880, 887 (S.D. Ohio 2003)
(allowing relation back of amendment adding various other improper fees to original complaint for improper attorney fees since all fees “arose out of the same mortgage notes, forbearance agreements, and payoff statements”).


135 This was recognized by the Supreme Court in the early decision Tiller v. Atlantic Coast Line R.R., 323 U.S. 574 (1945). When plaintiff’s deceased was killed, she sued the railroad under the Federal Employers’ Liability Act. The statute of limitations expired. She moved to amend the complaint to assert violation of the federal Boiler Inspection Act. The amendment related back: The original complaint in this case alleged a failure to provide a proper lookout for deceased. . . . The amended complaint charged the failure to have the locomotive properly lighted. Both of them related to the same general conduct, transaction, and occurrence which involved the death of the deceased. There was therefore no departure. The cause of action now, as it was in the beginning, is the same—it is a suit to recover damages for the alleged wrongful death of the deceased.

Id. at 581. As the Court said, both the original complaint and the amendment arose out of the death of plaintiff’s deceased, a single tortious event. Plaintiff simply changed her theory of recovery, and law is irrelevant to identifying the same conduct, transaction, or occurrence. See also Ruta v. Delta Airlines, Inc., 322 F. Supp. 2d 391 (S.D.N.Y. 2004) (allowing relation back of amendment adding slander theory to seven original theories of recovery all arising from plaintiff’s removal from airplane); Drakatos v. R.B. Denison, Inc., 493 F. Supp. 942, 945 (D. Conn. 1980) (approving relation back of amendment changing tort and contract theories to admiralty for death of sailor since “same core event or transaction”); Bonerb v. Richard J. Caron Foundation, 159 F.R.D. 16 (W.D.N.Y. 1994) (new theory of counseling malpractice arose from same nucleus of operative facts and so related back to original theory of negligent maintenance of basketball court since plaintiff injured in required exercise program); Zagurski v. American Tobacco Co., 44 F.R.D. 440 (D. Conn. 1967) (new theory of failure to warn of danger of smoking related back to original theories of negligent manufacture and breach of warranty since all arose from plaintiff’s smoking defendant’s cigarettes).

Some judges fail to see the common conduct, transaction, or occurrence in a single tortious event and issue unsupportable opinions. The worst of these is probably Moore v. Baker, 989 F.2d 1129 (11th Cir. 1993). Plaintiff sued her surgeon on an informed consent theory. After the statute of limitations expired, she sought to amend to add allegations of negligence in the surgery and post-operative care. The court refused to allow relation back because the amendment raised actions during and after the surgery and the original complaint raised actions prior to the surgery. These were “different times and involved separate and distinct conduct,” said the court. Id. at 1132. In Tiller, the Supreme Court recognized that all allegations arose from one wrongful death; in Moore, the court failed to recognize that all allegations arose from one surgery. The Moore court wandered astray in part because it opined “the allegations asserted in Moore’s original complaint contain nothing to put Dr. Baker on notice that the new claims of negligence might be asserted.” Id. First, the court was wrong that the complaint failed to give
The “conduct, transaction, or occurrence” test of the relation back of amendments rule serves to defeat the statute of limitations, an objective that is controversial. In comparison, the “transaction or occurrence” test of various joinder rules serves the purpose of handling all aspects of a litigation together to promote economy and efficiency, an objective that is generally agreed to be salutary. Consequently, one might think courts would be more grudging in interpreting the relation back standard than they are in interpreting the similar joinder standard. The opposite is true. Courts are in general more generous in interpreting the relation back standard than joinder standards.\(^{136}\) Perhaps the reason is that an amendment advances the same case while joinder can greatly complicate a case for the court.

IV. RULE 54(b): INTERLOCUTORY APPEALS IN MULTIPLE CLAIMS CASES

Another area that the claim and the transaction or occurrence tie together is interlocutory appeal in a case including “multiple claims.”\(^ {137}\) Once again, the task at hand is to define a claim in order to recognize when a case presents multiple claims.

A. History of Rule 54(b)

notice since the original complaint placed defendant on notice plaintiff was suing on the set of facts surrounding one operation. Second, notice was not a proper consideration. See supra note 127. Finally, the court referred to “new claims of negligence.” Plaintiff had only one claim: for injuries caused her by one surgery. Moore has done additional damage because it was relied on to reach the same erroneous result in Simmons v. United States, 225 F.R.D. 688 (N.D. Ga. 2004). But see Azarbal v. Medical Center of Del., Inc., 724 F. Supp. 279 (D. Del. 1989) (recognizing single operation created single claim).

Another case failing to recognize the commonality of a single set of facts is In the Matter of Rationis Enterprises, Inc., 45 F. Supp. 2d 365 (S.D.N.Y. 1999), in which a cargo claimant was not allowed to amend to add a fourth bill of lading to the three bills of lading originally pleaded when all cargo covered was lost in a single incident on a single voyage of the same ship.

\(^{136}\) See supra Part II.

\(^{137}\) Fed. R. Civ. P. 54(b).
The federal rules expanded the judicial unit to include multiple parties and multiple claims, replacing forms of action, causes of action, and the division of law and equity with the claim for relief and the “civil action.” These developments conflicted with the requirement of a final judgment for appeal, and created the need for a device to lessen “the danger of hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties before a final judgment can be had.” The device chosen was rule 54(b), allowing appeal prior to a final judgment when “more than one claim for relief is presented in an action.” Rule 54(b) thus was an integral part of the procedural system created by the federal rules.

The original language of rule 54(b) made its integration with the joinder and pleading rules even more obvious than it is today; as promulgated in 1938, the rule read as follows:

When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims.

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139 Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950). See also Indiana Harbor Boat R.R. v. American Cyanamid Co., 860 F.2d 1441, 1443 (7th Cir. 1988) (“[T]he drafters recognized that the liberal joinder rules proposed therein would lead to more complex lawsuits and create a greater potential for injustice for litigants who had to await the conclusion of the entire litigation even though their rights on certain issues had been conclusively resolved early on.”); Clark v. Taylor, 163 F.2d 940, 943 (2d Cir. 1947) (Clark, J.).

140 Fed. R. Civ. P. 54(b) (as promulgated in 1938). This part of the rule is substantially unchanged today.


142 Fed. R. Civ. P. 54(b) (as promulgated in 1938) [emphasis added].
As can be seen, the transaction or occurrence, the keystone of the joinder rules, was also an important part of this rule. Inclusion indicated that “claim for relief” in the rule was to be interpreted consistently with other joinder and pleading rules. Indeed, the committee reporter interpreted the rule entirely consistently with his—and the rules’—concept of claim.\footnote{Only two years after promulgation of the federal rules, Judge Charles E. Clark had the opportunity to rule on the proper meaning of claim, but was unable to convince his other two colleagues on the panel, in Sidis v. F-R Pub. Corp., 113 F.2d 806, 811 (2d Cir. 1940) (Clark, J., dissenting) (arguing that decision on one of three “causes of action” all arising from a single event were only differing theories of legal recovery constituting a single transaction or occurrence). Seven years later, he wrote for a majority of two—still with one judge dissenting—in Clark v. Taylor, 163 F.2d 940, 942-43 (2d Cir. 1947):

The theory adopted in the new rules, including the pertinent rule here, 54(b) . . . has been that the ‘transaction’ or ‘occurrence’ is the subject matter of a claim, rather than the legal rights arising therefrom; additions to or subtractions from the central core of fact do not change this substantial identity so as to support piecemeal appeals. One would think that other judges would have been more willing to defer to the reporter of the advisory committee. We have no record of the private dynamic between new Judge Clark and the more senior judges on the Second Circuit.\footnote{In Reeves v. Beardell, 316 U.S. 283, 285 (1942), the Court said “The Rules make it clear that it is ‘differing occurrences or transactions, which form the basis of separate units of judicial action,’” quoting Atwater v. North Am. Coal Corp., 111 F.2d 125, 126 (2d Cir. 1940) (Clark, J., concurring).}

Consequently, rule 54(b) was amended.\footnote{Histories of the rule can be found in WRIGHT ET AL., supra note 7, § 1653; William J. Serritella, Jr., Student Note, Kelly v. Lee’s Old Fashioned Hamburgers: A Step Back from Certainty under Rule 54(b), 41 DEPAUL L. REV. 257, 265-70 (1991).} First, to deal with the difficulty}
of allowing early appeal of counterclaims and other like claims, the requirement of final decision on all claims arising from the same transaction or occurrence was eliminated in favor of new language that clarified “a claim, counterclaim, cross-claim, or third-party claim” was a separable claim even though it arose from the same transaction or occurrence.\textsuperscript{147} Second, to deal with the uncertainty of time to appeal, new language appointed the district judge as gatekeeper to “certify” the appeal by deciding “there is no just reason for delay and upon an express direction for the entry of judgment.”\textsuperscript{148} The amendment made no change at all in the requirement that the action include multiple claims. The rule today—as it has from the beginning in 1938—requires multiple claims:

When an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.\textsuperscript{149}

Rule 54(b) does not exist in a vacuum. First, the general rule of appeal from district court to court of appeals is the final judgment rule.\textsuperscript{150} Rule 54(b) is a carefully-crafted exception to the

\textsuperscript{147}\textsc{Fed. R. Civ. P.} 54(b). The multiplicity of a claim and counterclaim, even through both arose from the same transaction or occurrence, was affirmed in \textit{Cold Metal Process Co. v. United Eng’g & Foundry Co.}, 351 U.S. 445 (1956).

\textsuperscript{148}\textsc{Fed. R. Civ. P.} 54(b).

\textsuperscript{149}\textsc{Fed. R. Civ. P.} 54(b). The language allowing appeal in cases involving multiple parties was added by amendment in 1961. See \textsc{Fed. R. Civ. P.} 54(b), 368 U.S. 1015-16 (1961).

\textsuperscript{150}28 U.S.C. § 1291 (2000) provides “The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .”
final judgment rule. As such, Rule 54(b) should be interpreted strictly and narrowly. Second, as with other jurisdictional statutes and rules, mechanical interpretation is desirable for certainty. Third, the final judgment rule together with rule 54(b) are Congressional decisions on the limits of federal court jurisdiction, not merely matters of sound judicial administration.

B. Misinterpretations of Rule 54(b)

"From the very beginning . . . courts have been confused as to when an action presented multiple claims." That statement is almost true. The first interpretation of rule 54(b) came in Reeves v. Beardell. The Supreme Court recognized that separate “occurrences or transactions” form the “basis of separate units of judicial action,” and held that the case presented two claims since they “arose out of wholly separate and distinct transactions or engagements.”

Unfortunately, Reeves was an obscure, cryptic opinion that was roundly disregarded. Soon the
lower courts developed two competing tests to identify multiple claims: the “cause of action” test posited that separate legal theories created separate claims, and the “pragmatic” or “factual occurrence” test posited that only separate underlying factual occurrences created separate claims. Of these two, the “cause of action” test was obviously wrong, a holdover from the abandoned code pleading system. As for the “factual occurrence” test, courts further created two sub-tests: whether the two “claims” required proof by different evidence, and whether the central fact pattern differed. As with the two main tests, the first was false and the second accurate. Thus, of four tests, one held true to the rule.


The Supreme Court approved the appeal of Counts I and II as claims separate from Counts III and IV. The Court praised the 1948 amendment to rule 54(b) with its creation of the

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158 Student Note, supra note 157, at 231-32.


160 351 U.S. at 896-97.
district judge as gatekeeper for dispatch of appeals based on considerations of sound judicial administration, but ignored almost entirely the rule requirement that the action include multiple claims. The only reasoning the Court gave to support its decision that the action included multiple claims was the following:

In the case before us, there is no doubt that each of the claims dismissed is a ‘claim for relief’ within the meaning of Rule 54(b) . . . . Also, it cannot well be argued that the claims stated in Counts I and II are so inherently inseparable from, or closely related to, those stated in Counts III and IV that the District Court has abused its discretion in certifying that there exists no just reason for delay. They certainly can be decided independently of each other.

* * *

It could readily be argued here that the claims stated in Counts I and II are sufficiently independent of those stated in Counts III and IV to satisfy the requirements of Rule 54(b) even in its original form. If that were so, the decision dismissing them would also be appealable under the amended rule. . . .

While it thus might be possible to hold that in this case the Court of Appeals had jurisdiction under original Rule 54(b), there at least would be room for argument on the issue of whether the decided claims were separate and independent from those still pending in the District Court.161

The sum total of the Court’s reasoning was “there is no doubt,” “it cannot well be argued,” “it could readily be argued,” “if that were so,” “it might be possible to hold,” and “there at least would be room for argument.” To be entirely fair, the Court did add a footnote stating that even though the different counts “rest in part on some of the facts” involved in other counts, the “basis of liability” is independent.162

Did the action include multiple claims? Certainly not, as all four counts arose from a common set of facts; the later counts even incorporated the facts of Count I by reference. Yet Sears, Roebuck has been interpreted to stand for the proposition that multiple claims can arise from a common set of facts. Because this is a Supreme Court decision, commentators treat it

161 Id. at 436-37.

162 Id. at 901 n. 9.
The decision does not deserve to be treated gingerly. It is a bad decision, one of the worst in the history of the Court. It is just wrong.

_Sears, Roebuck_ has done great damage to interpretation of rule 54(b). No other Supreme Court decisions counterbalance it. Early lower court decisions flatly stated they were foreclosed by _Sears, Roebuck_ from ruling–as they apparently wished to do correctly–that a single set of facts presented a single claim. Based primarily on _Sears, Roebuck_, lower courts...

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163 E.g., WRIGHT ET AL., _supra_ note 7, § 2657, at 69 (stating the opinion does “not significantly clarify the situation”).

164 The opinion is signed by Mr. Justice Harold Burton, but it reads as if it were written by a first-year law student. The first sentence of the opinion begs the question. It gets the date of the adoption of the FED. R. CIV. P. wrong. It goes off on “if this” and “if that” tangents. It uses “it could readily be argued here” construction. _See infra_ note 162 and accompanying text.

165 The Supreme Court has examined FED. R. CIV. P. 54(b) only a few times. The first was Reeves v. Beardell, 316 U.S. 283 (1942). In Reeves, the Court got off to a good start by indicating that separate claims arise “out of wholly separate and distinct transactions or engagements.” _Id._ at 286. _See supra_ notes 155-56 and accompanying text. Reeves had almost no influence, however, as it was early, short, and obscure, and was thought to be repudiated a decade later by _Sears, Roebuck_. E.g., Student Note, _supra_ note 157, at 233. Other Court decisions have touched only fringes of the rule. Decided the same day as _Sears, Roebuck_, Cold Metal Process Co. v. United Eng’g & Foundry Co., 351 U.S. 445 (1956), unremarkably concluded a compulsory counterclaim was a separate claim from the original claim. Curtiss-Wright Corp. v. General Electric Co., 466 U.S. 1 (1980) re-affirmed that only a final decision on any claim is appealable.

166 Judge John Minor Wisdom, sitting by designation on the Seventh Circuit, wrote as follows: [O]nly a definition of ‘separate claims’ as claims resting on entirely different facts could be applied systematically. Yet the Supreme Court rejected such a mechanical definition in _Sears, Roebuck_ and _Cold Metal_, both of which held that ‘separate claims’ for Rule 54(b) purposes can arise out of the same transaction and can overlap in important respects. Local P-171, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Thompson Farms Co., 642 F.2d 1065, 1070 (7th Cir. 1981). Two years later, Judge Richard Posner agreed: [T]he presumption should be against characterizing a pleading as containing multiple claims for relief rather than one claim. If we had our druthers we would hold that claims were never separate for Rule 54(b) purposes if they arose out of the same factual setting, but the Supreme Court rejected this approach in _Sears, Roebuck_ and _Cold Metal_.

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from then until today repeat the canard that no satisfactory definition for “claim” exists, assert
that a “practical” analysis is needed, and then proceed to add yet another gloss to the rule.
Some lower courts just skip past the multiple claims requirement and appear to decide solely on
considerations of sound judicial administration; most of these decisions refuse the appeal on the
reasoning that the case will return to the appellate court a second time and require the court to re-
learn the same facts. That lower courts have labored with rule 54(b) is understandable given
the road sign of Sears, Roebuck pointing in the wrong direction.

C. Applying The Correct Definition of Claim to Rule 54(b)

Minority Police Officers Ass’n v. City of South Bend, 721 F.2d 197, 200 (7th Cir. 1983). The
citation to Cold Metal by these opinions seems inappropriate since a claim by A against B is not
the same claim as B against A even when both are based on the same facts.

167 Moore et al., supra note 8, § 54.22[2][b][i].

168 E.g., Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 518 F.3d 459, 464 (7th
Cir. 2008) (finding “guidance” in considerations of separate recovery, splitting claims, same
event or occurrence, different legal entitlements, legally distinct, and different facts); In re
Southeast Banking Corp. v Bassett, 69 F.3d 1539, 1547-48 (11th Cir. 1995) (identifying separate
claims from separate recoveries and effect on additional appeals); Sussex Drug Prods. v.
Kanasco, Ltd., 920 F.2d 1150, 1154-56 (3d Cir. 1990) (pronouncing itself “[h]esitant to slog
through an exhaustive survey of opinions in search of an elusive decisive formula,” then
proceeding to slog through seven methods of identifying separate claims): Local P-171,
Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Thompson Farms Co., 642 F.2d
1065, 1070 (7th Cir. 1981) (disclaiming “general definition” in favor of “rules of thumb” to
identify separate claims).

169 This approach probably traces back to Curtiss-Wright Corp. v. General Electric Co., 466 U.S.
1 (1980), in which the Supreme Court paid no attention to the multiple claims requirement and
opined at length on considerations of sound judicial administration in allowing rule 54(b)
appeals. See, e.g., Lottie v. West Am. Ins. Co., 408 F.3d 935 (7th Cir. 2005) (disallowing appeal
because of possible later duplicative appeal in case obviously presenting a single claim of three
legal theories on one set of facts); Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819
F.2d 1519, 1525 (9th Cir. 1987) (asserting identification of separate claims is “subtle” and
“eludes the grasp like quicksilver,” so “given the size and complexity of this case, we cannot
condemn the district court’s effort to carve out threshold claims” even though all “claims” arose
from single event).
One opinion in one rule 54(b) case begins by asserting that “the appeals are rich with issues, and to discuss them intelligently we shall have to simplify matters brutally.”\textsuperscript{170} Even though the judge in that case did not proceed to follow his own admonition, that attitude is precisely what is needed. The courts need to apply consistently two basic principles on which they generally agree to define a claim for purposes of rule 54(b). One, a single set of facts presents a single claim. Two, different legal theories applied to the same facts do not present multiple claims.

1. A Single Set of Facts Presents One Claim

When required to plead “a short and plain statement of the claim,” a pleader asserts a single set of facts.\textsuperscript{171} When determining whether multiple claims are present in an action for purposes of appeal under rule 54(b), the same definition of claim applies: “One set of facts producing one injury creates one claim for relief, no matter how many laws the deeds violate.”\textsuperscript{172} A variant is “claims are not separate for Rule 54(b) purposes if the facts they depend on are

\textsuperscript{170}Olympia Hotels Corp. v. Johnson Wax Devel. Corp., 908 F.2d 1363, 1365 (7th Cir. 1990) (Posner, J.). See also Federal Deposit Ins. Corp. v. Elefant, 790 F.2d 661, 664 (7th Cir. 1986) (stating general rule that a contract is one claim, recognizing appellate jurisdiction should be mechanical, and stopping “at the starting place”).

\textsuperscript{171}“These rules make the extent of the claim involved depend not upon legal rights, but upon the facts, that is, upon a lay view of the past events which have given rise to the litigation.” CHARLES E. CLARK, CASES ON PLEADING AND PROCEDURE 658-59 (2d ed. 1940) (citations omitted). See supra Part III.A.

\textsuperscript{172}NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 292 (7th Cir. 1992). See Rieser v. Baltimore & Ohio R.R., 224 F.2d 198, 199 (2d Cir. 1955) (“multiplicity of claims must rest in every case on whether the underlying factual bases for recovery state a number of different claims which could have been separately enforced”) (Clark, J.). This language is criticized as “somewhat tautological,” WRIGHT ET AL., supra note 7, § 2657, at 73, but I think the proper interpretation is that Judge Clark was equating the definition of multiple claims under rule 54(b) to the same definition of claim for purposes of pleading.
largely the same, or, stated otherwise, if the only factual differences are minor.\textsuperscript{173} One way of recognizing one claim is by recognizing a single transaction or occurrence.\textsuperscript{174} Many cases agree with these variants of the same proposition either explicitly or implicitly in their results.\textsuperscript{175} One accident creates one claim. One job action creates one claim. One contract creates one claim.\textsuperscript{176}

2. \textit{Legal Theories of Recovery on the Same Facts are Not Multiple Claims}

Since a claim is identified and bounded by facts instead of law and one set of facts constitutes one claim, the opposite proposition is that different theories of law based on the same set of facts does not create more than one claim.\textsuperscript{177} Some courts state the proposition boldly and

\textsuperscript{173}Minority Police Officers Ass’n v. City of South Bend, 721 F.2d 197, 201 (7th Cir. 1983).

\textsuperscript{174}E.g., Local P-171, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Thompson Farms Co., 642 F.2d 1065, 1070 (7th Cir. 1981) (tacitly approving a definition of different claims as arising from different facts and likening the test to the same transaction [or occurrence]). \textit{Cf.} Acha v. Beame, 570 F.2d 57, 62 (2d Cir. 1978) (‘’generally accepted’’ that claim in rule 54(b) means ‘‘one legal right growing out of a single transaction or series of related transactions’’).

\textsuperscript{175}\textit{See, e.g.}, Soliday v. Miami County, 55 F.3d 1158 (6th Cir. 1995) (refusing appeal involving three defendants over two time periods all arising from one death); Tolson v. United States, 732 F.2d 998 (D.C. Cir. 1984) (refusing appeal attempting to separate liability on \textit{respondeat superior} from negligent supervision on same facts); Oyster v. Johns-Manville Corp., 568 F. Supp. 83 (E.D. Pa. 1983) (refusing to allow appeal of intentional tort theory after dismissal of other tort and contract theories since single transaction and one ‘‘core of operative facts’’).

The leading case in the Second Circuit states the definition well as ‘‘the aggregate of operative facts which give rise to a right enforceable in the courts.’’ Original Ballet Russe v. Ballet Theatre, 133 F.2d 187, 189 (2d Cir. 1943); later applications of the seemingly simple rule leave something to be desired. \textit{See} Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414 (2d Cir. 1989) (quoting \textit{Original Ballet Russe} but then proceeding to identify multiple ‘‘causes of action’’ and ‘‘claims’’ arising from building one naval base); Gottesman v. General Motors Corp., 401 F.2d 510 (2d Cir. 1968) (quoting \textit{Original Ballet Russe} but then proceeding to identify 14 ‘‘causes of action’’ arising from same set of facts).

\textsuperscript{176}Federal Deposit Ins. Corp. v. Elefant, 790 F.2d 661 (7th Cir. 1986).

\textsuperscript{177}‘‘[T]he new rules make it clear that it is not differing legal theories, but differing occurrences or transactions, which form the basis of separate units of judicial action.’’ Atwater v. North Am. Coal Corp., 111 F.2d 125, 126 (2d Cir. 1940) (Clark, J., concurring). Similarly, different types of relief on one set of facts and one legal theory constitute one claim. Liberty Mut. Ins. Co. v.
apply it boldly. \(^{178}\) Some courts state the proposition boldly and decide on other bases. \(^{179}\) Some courts state the proposition boldly and misunderstand what they have just said. \(^{180}\)

In this area, as in many others, a never-ending problem is the continuing loose use of “claim,” or much worse “cause of action,” to refer to a legal theory of recovery instead of its proper use to refer to a set of facts. This imprecision almost always causes unneeded difficulty in recognizing separate claims for purposes of rule 54(b). \(^{181}\) Sometimes it leads the court into

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\(^{178}\) See, e.g., Indiana Harbor Boat R.R. v. American Cyanamid Co., 860 F.2d 1441, 1445 (7th Cir. 1988) (rule is “a number of legal theories in support of only one possible recovery has stated only one claim for relief”); Automatic Liquid Packaging, Inc. v. Dominik, 852 F.2d 1036, 1037 (7th Cir. 1988) (“A theory is not a claim . . .”); Backus Plywood Corp. v. Commercial Decal, Inc., 317 F.2d 339 (2d Cir. 1963) (since claim denotes aggregate of operative facts, striking two of plaintiff’s three “causes of action” not appealable); Cmax, Inc., v. Drewry Photocolor Corp., 295 F.2d 695, 697 (9th Cir. 1961) (“The word ‘claim’ in Rule 54(b) refers to a set of facts giving rise to legal rights in the claimant, not to legal theories of recovery based upon those facts.”).

\(^{179}\) See, e.g., Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1525 (9th Cir. 1987) (asserting need to distinguish claim from theory of recovery creates “subtle jurisprudence” then proceeding to allow appeal on considerations of judicial administration); United States v. Crow, Pope & Land Enterprises, Inc., 474 F.2d 200, 202 (5th Cir. 1973) (“legal theories of relief are so intertwined as to constitute a single claim”); Moore et al., supra note 8, § 54.22[2][b][1] n. 47 (collecting cases emphasizing splitting claims for res judicata purposes).

\(^{180}\) See, e.g., Stearns v. Consolidated Mgt., Inc., 747 F.2d 1105, 1109 (7th Cir. 1984) (stating “mere variations of legal theory do not constitute separate claims” and then holding plaintiff’s complaint on theories of age discrimination and civil rights violations for same termination involved “separate legal rights” so were separate claims); Gas-A-Car, Inc. v. American Petrofina, Inc., 484 F.2d 1102 (10th Cir. 1973) (recognizing same aggregate of operative facts for both legal theories but concluding facts not “totally identical”).

\(^{181}\) See, e.g., Lowery v. Federal Express Corp., 426 F.3d 817, 819 (6th Cir. 2005) (following a single unfavorable job action, plaintiff brought “claims of race discrimination and retaliation in violation of Title VII [and amended to add a] cause of action for breach of contract”); Wood v. GCC Bend, LLC, 422 F.3d 873, 879-80 (9th Cir. 2005) (referring to “claims” for federal age discrimination, state age discrimination, and wrongful discharge from same termination but reaching correct result by deciding one “claim” is “not truly separable from Wood’s other claims”); General Acquisition, Inc. v. GenCorp, Inc., 23 F.3d 1022, 1029 (6th Cir. 1994) (recognizing single wrong and so single claim because “all of the causes of action arise out of a
clear error. Such loose use of language is also hard to understand. Thinking of legal theories as causes of action—or even as claims— is a throwback to code procedure and common law pleading. It should be recognized and eradicated. For proper interpretation of rule 54(b)—

single aggregate of operative facts”); Backus Plywood Corp. v. Commercial Decal, Inc., 317 F.2d 339 (2d Cir. 1963) (plaintiff pleaded three “causes of action” on same events but appeals court recognized single claim).

An early case in the Ninth Circuit doggedly stated that “claim,” as used in rule 54(b), meant “cause of action.” Steiner v. 20th Century-Fox Film Corp, 232 F.2d 190, 193 n. 3 (9th Cir. 1956). The court added “We recognize our interpretation of ‘claim’ is contrary to the holding in Dioguardi v. Durning, 2 Cir., 1944, 139 F.2d 774.” In other words, the court casually said Judge Clark, the reporter for the advisory committee and the author of Dioguardi, had it all wrong in the definition of a claim under the rules. The ludicrous statement that claim means cause of action was repeated in other early Ninth Circuit opinions, e.g., School Dist. v. Lundgren, 259 F.2d 101, 104 (9th Cir. 1958) (adding to the error by asserting the “same result is reached by equating ‘claim’ with ‘basis of liability’”), and found its way into at least one early Seventh Circuit opinion, Smith v. Benedict, 270 F.2d 211, 213 (7th Cir. 1960). We can note that both of these courts sit in code states and the judges were most likely trained in code procedure. Fortunately, this egregious misstatement does not appear in later cases.

Even the leading treatises on federal procedure require more precision. See MOORE ET AL., supra note 8, § 54.22[2][b][i] (“if the causes of action or factual allegations asserted permit only one recovery, only one claim for relief is presented”); WRIGHT ET AL., supra note 7, § 2657, at 76-77 (“A single claimant presents multiple claims for relief under the Second Circuit’s formulation when the possible recoveries are more than one in number and not mutually exclusive or, stated another way, when the facts give rise to more than one legal right or cause of action.”).

See NAACP v. American Family Mut. Ins. Co., 978 F.2d 287, 291-92 (7th Cir. 1992): Plaintiffs’ complaint begins with 66 paragraphs and then states five ‘claims,’ each of which incorporates these paragraphs and asserts one reason why the conduct is wrongful. . . . Identifying legal theories may assist defendants and the court in seeing how the plaintiff hopes to prevail, but this organization does not track the idea of “claim for relief” in the federal rules. Putting each legal theory in a separate count is a throwback to code pleading, perhaps all the way back to the forms of action . . . A complaint should limn the grievance and demand relief. It need not identify the law on which the claim rests, and different legal theories therefore do not multiply the number of claims for relief.

One set of facts producing one injury creates one claim for relief, no matter how many laws the deeds violate.
as well as all other federal rules—federal judges must eliminate cause-of-action-code-thinking from their lexicon.

D. Deciding Appeal of Part of a Single Claim under Rule 54(b)

Since the courts are in general agreement with the proposition that a single set of facts constitutes one claim and its mirror image that multiple legal theories based on the same set of facts are not multiple claims, how should a court of appeals or a district court respond to an attempted rule 54(b) appeal that splits a single claim? The answer is refuse the appeal swiftly and decisively.

Some courts demonstrate they know how to handle an attempted rule 54(b) appeal of part of a single claim. They summarily deny or dismiss the appeal in a one-page opinion. That is the proper response. Other courts unnecessarily multiply the pages used by stating the proper response, dithering around in various peripheral considerations, and finally returning to the correct result. These courts not only make hard work of easy cases but also multiply the

\[185^{\text{See supra Part IV.C.}}\]

\[186^{\text{See Edney v. Fidelity & Guaranty Life Ins. Co., 348 F.2d 136, 138 (8th Cir. 1965) (“separate claims can exist only where there are ‘differing occurrences or transactions, which form the basis of separate units of judicial action’”); General Constr. Co. v. Hering Realty Co., 312 F.2d 538, 540 (4th Cir. 1963) (“single claim of two parts”); Cmax, Inc., v. Drewry Photocolor Corp., 295 F.2d 695 (9th Cir. 1961); Arnold v. Bache & Co., 377 F. Supp. 66 (M.D. Pa. 1973).}}\]

\[187^{\text{See, e.g., Lowery v. Federal Express Corp., 426 F.3d 817 (6th Cir. 2005) (when plaintiff sued on three theories arising from same termination, court recognized all three “claims” or “causes of action” arose from same aggregate of operative facts but retreated to abuse of discretion in finding no just reason for delay); Lottie v. West Am. Ins. Co., 408 F.3d 935 (7th Cir. 2005) (when plaintiff sued on three theories for denial of insurance for two fires, court bounced back and forth between “claim” and “claims” before denying appeal on judicial administration considerations); Sussex Drug Prods. v. Kanasco, Ltd., 920 F.2d 1150 (3d Cir. 1990) (recognizing more than once that separate theories of liability are not separate claims before finally turning to “entire controversy” doctrine and adding considerations of judicial administration); A/S Apothekernes Laboratorium for Special Praeparater v. I.M.C. Chemical Group, Inc., 725 F.2d 1140 (7th Cir. 1984) (finding five counts of complaint constituted only one claim but adding dicta that one part of facts might have constituted separate claim had allegations been different).}\]
chances of issuing ill-considered dicta using loose language. Courts should not engage in unnecessary and unproductive hand-wringing. When a party seeks to appeal a legal theory on the basis it is a claim, the court should set the party straight quickly and concisely. At least the courts inflating their opinions recognize that a theory of recovery is not a claim. Many opinions are published in which courts fail to recognize this basic principle. Others wrongly engage in parsing a single set of facts to find multiple claims.

Interpretation of the multiple claims requirement in rule 54(b) does not differ from the interpretation of a claim for purposes of pleading and from its close cousin the transaction or

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188 See, e.g., Samaad v. City of Dallas, 940 F.2d 925, 932 (5th Cir. 1991) (deciding two theories on same facts are separate claims as “depend upon the violation of separable constitutional rights); Hudson River Sloop Clearwater, Inc. v. Department of the Navy, 891 F.2d 414, 418 (2d Cir. 1989) (even though all of plaintiffs’ theories arose from one proposed naval base, court decided “causes of action” remaining in district court did not involve nuclear weapons and “claims” appealed did involve nuclear weapons); Gregorian v. Izvestia, 871 F.2d 1515, 1520 (9th Cir. 1989) (applies wrong abuse of discretion review standard to district court’s decision that two of plaintiff’s 14 “claims” arising from same facts against defendant were separate based on “factual and legal issues involved” [emphasis added]). Cf. Wood v. GCC Bend, LLC, 422 F.3d 873 (9th Cir. 2005). Plaintiff asserted three theories of recovery for a single termination. The appeals court opined that in a routine employment discrimination case such as this one, it is “typical for several claims to be made.” The court proceeded to refuse the appeal on the ground of poor judicial administration since the same facts would come back in the second appeal as the remaining “claim” is “not truly separable.” Id. at 879.

189 See, e.g., Stearns v. Consolidated Mgt., Inc., 747 F.2d 1105, 1109 (7th Cir. 1984) (plaintiff sued on both age discrimination and civil rights theories for termination and court approved appeal of one since “[t]o prove violation of Title VII plaintiff must prove that her sex was a motivating factor . . ., her age is irrelevant, while the reverse is true of her ADEA claim”); Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir. 1984) (finding that facts supporting one charge of antitrust claim did not overlap sufficiently with other charge of same antitrust claim); Gas-A-Car, Inc. v. American Petrofina, Inc., 484 F.2d 1102, 1105 (10th Cir. 1973) (finding separate claims in two antitrust theories for same actions because facts not “totally identical”). Cf. Ty, Inc. v. Publications Int’l, Ltd., 292 F.3d 512 (7th Cir. 2002). The result is supportable as appeal of a case involving an injunction, 28 U.S.C. § 1292(a)(1), but court erroneously concludes a rule 54(b) appeal is possible because even though “the factual overlap might seem complete, . . . the only facts before us on this appeal, the facts bearing on PIL’s defense of fair use, are unlikely to be at issue in the trademark phase of the case.” Id. at 516.
occurrence.\textsuperscript{190} One set of facts constitutes one claim no matter how many legal theories are asserted arising from the same set of facts. One claim does not allow interlocutory appeal under rule 54(b).

V. SEEING THE FOREST OF THE UNITY OF CIVIL PROCEDURE

Those of us wandering through the forest of civil procedure study the trees. We examine the rules one at a time. What do we see by taking a look at the forest? We should see a unified, interlocked system of procedure surrounding the principle that the goal of procedural law is to serve substantive law. That is the philosophy embedded in the Federal Rules of Civil Procedure and necessarily into all state rules systems patterned after the federal rules.\textsuperscript{191}

The goal of rules procedure is to draw all factually-related matters into a single action that can conveniently and efficiently be resolved in one case. “The court’s goal is the litigative unit that ‘packages’ all persons interested in, and all claims arising from, a single transaction. It is what Judge Charles E. Clark, the primary drafter of the federal rules, referred to as litigation in a single envelope, defined transactionally.”\textsuperscript{192} Certainly an holistic unity ties all the joinder rules together through the “transaction or occurrence” to handle all parts of a single dispute together at one time.\textsuperscript{193} A single set of facts arising from one dispute is one unit of judicial action.\textsuperscript{194} This

\begin{itemize}
\item \textsuperscript{190}See infra Part V.
\item \textsuperscript{191}See supra note 13.
\item \textsuperscript{192}Freer, supra note 47, at 813 (citations omitted).
\item \textsuperscript{193}Lesnik v. Public Indus. Corp., 144 F.2d 968, 973 (2d Cir. 1944) (Clark, J.): “These rules are a part of that fundamental tenet of modern procedure that joinder of parties and of claims must be greatly liberalized to provide at least for the effective settlement at one time of all disputes of which parts are already before the court.” See supra Part II.A.
\end{itemize}
goal of unity does not begin and end with the joinder rules. They are only some trees in the
forest. The goal of coalescing a unit of judicial action around the transaction or occurrence is
also apparent in the pleading rules and elsewhere.\footnote{195} Writing on the subject of permissive
joinder of parties, one leading commentator recognizes this unity:

\begin{quote}
[T]he emphasis on transactional relatedness of the claims is consistent with the basic
definition of a civil action in federal court. Many federal joinder rules permit addition of
claims or parties based on transactional relatedness. Federal courts employ the
‘transaction or occurrence’ test to define the litigative unit. The Supreme Court has
employed a transactional test to define the scope of case or controversy under Article III
of the Constitution. The supplemental jurisdiction statute incorporates this standard in
addressing the scope of civil litigation. Preclusion doctrines also embrace a transactional
definition of a case.\footnote{196}
\end{quote}

\footnote{194}{Clark described the ‘unit of judicial action’ in terms that assumed an empirical, real-world,
factual unity to disputes: ‘The essential thing is that there be chosen a factual unit, whose limits
are determined by the time and sequence and unity of the happenings.’” Bone, \textit{supra} note 17, at
103 n. 349, \textit{citing} CLARK, \textit{supra} note 7, § 19, at 143.}

\footnote{195}{‘[T]he new rules make it clear that it is not differing legal theories, but differ ing
occurrences or transactions, which form the basis of separate units of judicial action. Cf. Rules 10(b)
[pleading separate transactions or occurrences in separate counts; 13(a) [compulsory
counterclaims], and 13(g) [cross-claims], 15(c) [relation back of amendments], 54(b)
[interlocutory appeal in action with multiple claims].” Atwater v. North Am. Coal Corp., 111
F.2d 125, 126 (2d Cir. 1940) (Clark, J., concurring).}

\footnote{196}{MOORE ET AL., \textit{supra} note 8, § 20.02[1][a]. The relationship of supplemental jurisdiction and
the transaction or occurrence will be explored in a forthcoming article by this author. With
regard to preclusion doctrine, \textit{RESTATEMENT (SECOND) OF JUDGMENTS} § 24 provides claim
preclusion includes “all or any part of the transaction, or series of connected transactions, out of
which the action arose.” Comments on this section are also highly instructive:

The present trend is to see claim in factual terms and to make it coterminous with the
transaction regardless of substantive theories, or variant forms of relief flowing from
those theories, that may be available to the plaintiff; regardless of the number of primary
rights that may have been invaded; and regardless of the variations in the evidence
needed to support the theories or rights. The transaction is the basis of the litigative unit
or entity which may not be split.

\textit{Id.} at comment a. “In general, the expression connotes a natural grouping or common nucleus of
operative facts.” \textit{Id.} at comment b.

[T]he Comment emphasizes the thoroughly factual character of ‘claim’; it is the
counterpart of transaction as an aggregate of facts which in various combinations, all
comprising a common core or nucleus of the facts, may support a number of substantive
legal theories with corresponding remedies. "[T]ransaction” or “occurrence” is the
subject matter of a claim rather than the legal rights arising therefrom; modifications to or
The litigative unit of the federal rules and all rules systems is the claim is the transaction or occurrence.

Since courts have struggled with the proper fact-based definition of claim and transaction or occurrence when they interpret individual rules in individual cases, we should not be surprised that courts and commentators have been reluctant to recognize the commonality of these concepts throughout the rules. “Claim” has been interpreted differently in different contexts. “Transaction or occurrence” has been interpreted differently in different contexts. We should ask why? The words of the rules are the same. The intent behind the rules is the same. The policies of convenience, economy, and efficiency behind the rules are the same. Some courts and commentators recognize that the rules should be interpreted the same. We should recognize the interlocked and unitary system of the federal rules and see the forest for the trees.

subtractions from the central core of facts do not change this substantial identity . . .’

Clark v. Taylor, 163 F.2d 940, 942 (2d Cir. 1947).

Id. at Reporter’s Note to comment c.

197 See supra Parts II.A, III.A.

198 See Musher Found., Inc. v. Alba Trading Co., 127 F.2d 9, 12 (2d Cir. 1942) (Clark, J., dissenting) (“narrow views . . . may lead to peculiar and uneconomical results so far as federal jurisdiction is concerned, but also to kindred problems involving res judicata, amendment, finality of judgments . . .’); Freer, supra note 47, at 817 (“no coincidence that, over time, the standards for joinder and for the exercise of supplemental jurisdiction have meshed, with the benchmark for defining an appropriate case being whether the claims to be joined . . . arise from the same transaction or occurrence”); MOORE ET AL., supra note 8, § 20.05[2] (“other Rules provide appropriate guidance for interpreting the scope of Rule 20;” “purpose of the preclusion doctrines is to define the appropriate scope of the litigative unit [so] cases construing ‘claims’ for preclusion doctrine purposes also can be instructive in defining the transactional relatedness component of permissive party joinder”). This interrelatedness is best stated in RESTATEMENT (SECOND) OF JUDGMENTS ch. 3 intro. note:

The term ‘claim,’ or the older cognate term ‘cause of action,’ appears in a variety of contexts to refer to a unit of litigation, for example: in stating what a complaint should contain and correspondingly in stating the basis for a demurrer or motion to dismiss a complaint for legal insufficiency; in describing what are permissible amendments of the pleadings; in setting periods of limitations; in regulating the number or kinds of
grievances that the parties may join in an action. The meaning or scope of claim is not necessarily the same in all the contexts. However, the ‘transactional’ meaning or scope ascribed in this Restatement to claim for purposes of res judicata is not singular to that subject. It is a meaning that is being progressively ascribed to claim in a number of the contexts in which it appears in a modern system of procedure.