

SEEING THE FOREST FOR THE TREES: THE TRANSACTION OR OCCURRENCE AND THE CLAIM INTERLOCK CIVIL PROCEDURE

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I. INTRODUCTION

A century ago, one well-known opinion moaned, “Court 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.”³ Many throw up their hands, muttering darkly about a case-by-case basis.⁴ Respected scholars argue no definition of “transaction or occurrence” is possible, and the search for a definition is counterproductive.⁵

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 wrote, “the new rules make it clear that it is not differing legal theories, but differing occurrences or transactions,

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¹ *McArthur v. Moffett*, 128 N.W. 445, 445 (Wis. 1910).

² *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 610 (1926).

³ See *infra* Part II (illustrating cases in which courts have struggled to come to a consensus on whether “transaction or occurrence” should be narrowly or broadly interpreted).

⁴ See *infra* Part II.

⁵ See Mary Kay Kane, *Original Sin and the Transaction in Federal Civil Procedure*, 76 TEX. L. REV. 1723, 1724 (1998); Charles Alan Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 591 (1952) [hereinafter Wright, *Joinder of Claims*].

which form the basis of separate units of judicial action.”⁶ This Article follows the transaction or occurrence and the claim through these rules, as well as the length of civil procedure, to the conclusion that the rules are an interlocked system.⁷

Second, the search for a definition 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”⁸ is properly defined factually.⁹ It is fact based.¹⁰ It is a set of facts, a grouping of facts, a guide to the facts, or perhaps more specifically, a common core of operative

⁶ *Atwater v. N. Am. Coal Corp.*, 111 F.2d 125, 126 (2d Cir. 1940) (Clark, J., concurring) (citation omitted). The Supreme Court recited this quotation with approval in *Reeves v. Beardall*. *Reeves v. Beardall*, 316 U.S. 283, 285 (1942) (quoting *Atwater*, 111 F.2d at 126). The fourteen-member advisory committee drafted the Federal Rules of Civil Procedure under the leadership of Reporter Charles E. Clark, who was a professor at Yale Law School and later a federal court of appeals judge. Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774-75 (1935).

⁷ Federal Rule of Civil Procedure 8(a)(2) requires pleading “a short and plain statement of [a] claim.” FED. R. CIV. P. 8(a)(2); *see infra* Part III.A. Federal Rule of Civil Procedure 10(b) strongly suggests pleading of separate transactions or occurrences in separate counts. FED. R. CIV. P. 10(b); *see infra* Part III.B. Federal Rule of Civil Procedure 13(a)(1)(A) identifies a compulsory counterclaim as arising out of the same transaction or occurrence. FED. R. CIV. P. 13(a)(1)(A). *See generally* Douglas D. McFarland, *In Search of the Transaction or Occurrence: Counterclaims*, 40 CREIGHTON L. REV. 699 (2007) (discussing the importance of a court’s interpretation of “transaction or occurrence” as applied to the Federal Rules of Civil Procedure). Federal Rule of Civil Procedure 13(g) permits pleading a cross-claim arising from the same transaction or occurrence. FED. R. CIV. P. 13(g); *see infra* Part II.B. Federal Rule of Civil Procedure 14(a) permits pleading certain claims in third-party practice arising from the same transaction or occurrence. FED. R. CIV. P. 14(a); *see infra* Part II.D. Federal Rule of Civil Procedure 15(c)(1)(B) allows an amendment to a pleading arising from the same conduct, transaction, or occurrence to relate back. FED. R. CIV. P. 15(c)(1)(B); *see infra* Part III.C. Federal Rule of Civil Procedure 20(a) permits joinder of parties when relief arises from the same transaction or occurrence. FED. R. CIV. P. 20(a); *see infra* Part II.C. Federal Rule of Civil Procedure 54(b) allows interlocutory appeal in cases involving multiple claims. FED. R. CIV. P. 54(b); *see infra* Part IV.

⁸ *Atwater*, 111 F.2d at 126.

⁹ *See infra* Part V (concluding that a court’s inquiry should be into the specific facts of a case).

¹⁰ *See* CHARLES E. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* § 102, at 653 (2d ed. 1947).

facts.¹¹ This necessarily means the transaction or occurrence—the “unit[] of judicial action”¹²—will expand or contract depending on the facts of the individual case.¹³ Law is irrelevant. This explains why courts have had such difficulty attempting to define the transaction or occurrence.¹⁴ 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 for firmer guidance in the law.¹⁵ Courts should follow the lead of the iconic Sergeant Joe Friday in the television series *Dragnet* to cut off glosses and tangents with a curt “just the facts, ma’am.”¹⁶

Third, courts having difficulty identifying the transaction or occurrence forget the phrase is one of inclusion.¹⁷ The primary policy of the Federal Rules of Civil Procedure can colloquially be stated as “one suit fits all,” i.e., all aspects of a single set of facts—multiple theories of recovery, multiple parties, multiple claims—should be handled together

¹¹ See *id.* Referring to the “transaction” still required in joinder devices in code states, Charles E. Clark recognizes that “[t]he 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 questions of trial expediency.” *Id.* 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 AND PROCEDURE § 1497 (3d ed. 1998) (internal citations omitted). Supplemental jurisdiction under 28 U.S.C. § 1367 (2006) 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 pendent jurisdiction, as announced in *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). See *infra* Part V.

¹² *Atwater*, 111 F.2d at 126.

¹³ See *infra* Part V.

¹⁴ See, e.g., *infra* Part II (illustrating examples of definitional disagreements among the courts).

¹⁵ See generally McFarland, *supra* note 7, at 709. For example, courts have created no fewer than four separate glosses on transaction or occurrence in compulsory counterclaim cases. See *id.*; 3 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 13.10[1][b] (3d ed. 1997); WRIGHT ET AL., *supra* note 11, § 1410.

¹⁶ *Dragnet* (NBC television broadcast).

¹⁷ The Supreme Court adopted a broad interpretation of the term when the Court stated: “‘Transaction’ is a word of flexible meaning.” *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 610 (1926).

within one suit to promote the policies of convenience, economy, and efficiency.¹⁸ Yet, we commonly encounter courts excluding, rather than including, by resorting to a law-based definition or a gloss on the transaction or occurrence.¹⁹

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.”²⁰ With tepid responses such as these, 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 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).”²¹

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”²² The same process now has been at work for decades under the rules as judges continue to

¹⁸ See *infra* Parts II.A, III.A.

¹⁹ See, e.g., *infra* Part II (examining cases in which courts have relied on these glosses or definitions).

²⁰ See generally *Warren G. Kleban Eng'g Corp. v. Caldwell*, 490 F.2d 800, 802 (5th Cir. 1974) (providing an example of a court decision that would warrant one of these responses).

²¹ See 6 WRIGHT ET AL., *supra* note 11, § 1432.

²² *McArthur v. Moffett*, 128 N.W. 445, 446 (Wis. 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 10, § 12.

interpret rules through code lenses to exclude instead of to include.²³ 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.²⁴ It is the clear intent of the drafters of the federal rules.²⁵ It is clear in the rule on joinder of claims, which is to bring them all.²⁶ The leading early commentator on the rules clearly embraced this philosophy in his pithy summary: “The purpose . . . is to make ‘one lawsuit grow where two grew before.’”²⁷ It is recognized

²³ Many judges are code trained, many live in states with code systems, and others simply do not understand the inclusive philosophy of the Federal Rules of Civil Procedure. 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.

²⁴ 7 WRIGHT ET AL., *supra* note 11, § 1652.

²⁵ See McFarland, *supra* note 7, at 702-03. At the time, Clark was the nation’s foremost authority on code procedure, and he seized the opportunity to embed throughout the federal rules his philosophy that procedural rules should be subservient to trials on the merits. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 297 (1938). Procedure must be “continually restricted to [its] proper and subordinate role” to substantive law. *Id.* Perhaps the most important corollary to this general rule is that one lawsuit should encompass all factually related claims and parties whenever possible, because joinder should be a function of convenience of trial not a restrictive decision at the pleading stage of a lawsuit. See McFarland, *supra* note 7, at 702-03. A decade after drafting the federal rules, Clark suggested how far he really wanted to go in joinder; under the topic of “Future Pleading Reform,” he advocated that “[a]mong minimum desirable reforms of pleading are provisions for free joinder of parties and of actions, including . . . free amendments.” CLARK, *supra* note 10, § 12.

²⁶ See FED. 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.” *Id.*

²⁷ Wright, *Joinder of Claims*, *supra* note 5, at 580. Professor Wright advises that “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

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.”²⁸ It is clearly recognized by leading commentators today.²⁹

Consequently, the attitude of a court should be to apply this overall philosophy. An earlier article explored compulsory counterclaim cases.³⁰ 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.³¹ The conclusion follows that these rules form a consistent, interlocked system of procedure.³²

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 Alan Wright, *Modern Pleading and the Alabama Rules*, 9 ALA. L. REV. 179, 180-81 (1957).

²⁸ *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966).

²⁹ See MOORE ET AL., *supra* note 15, § 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.”); see also 7 WRIGHT ET AL., *supra* note 11, § 1652 (“The purpose of the rule is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits.”) (internal citations omitted); 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 structure for each dispute.”); Michael E. Smith, *Judge Charles E. Clark and The Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 916 (1976) (“Clark implicitly urged . . . cases would be decided on their merits rather than by procedural rulings, and this would occur with an economy of time and resources.”); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 962 (1987) (“One theme pervades [Clark’s] works: procedural technicality stands in the way of reaching the merits, and of applying substantive law.”).

³⁰ See generally McFarland, *supra* note 7.

³¹ See *infra* Parts II.B-D (joinder), III (pleading), & IV (interlocutory appeals).

³² See *infra* Part V.

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.³³

A defendant is allowed to claim against another defendant—or a plaintiff against another plaintiff—only when the proposed cross-claim against the coparty arises from the same transaction or occurrence as a claim already within the litigation.³⁴

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, i.e., “to settle as many related claims as possible in a single action.”³⁵ A court should inquire whether the claim and cross-claim both arise from the same interrelated set of facts.³⁶ A few examples will suffice.

³³ FED. R. CIV. P. 13(g) (emphasis added).

³⁴ *Id.* The defining test for a cross-claim is the same as the defining test for a compulsory counterclaim: the transaction or occurrence. 6 WRIGHT ET AL., *supra* note 11, § 1432. Courts not surprisingly apply the same reasoning to interpret the phrase in both types of cases. *Id.* What is somewhat surprising is the paucity of cross-claim cases compared with the abundance of compulsory counterclaim cases. Perhaps coparties 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 litigation.

³⁵ 6 WRIGHT ET AL., *supra* note 11, § 1431.

³⁶ *See id.*

The paradigm case is *LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander*.³⁷ As part of construction of the city hall in Memphis, Tennessee, Italian corporation LASA supplied marble to subcontractor Alexander.³⁸ Unpaid, LASA filed suit against subcontractor Alexander, the prime contractor, the prime contractor's surety, and the city of Memphis.³⁹ Alexander then cross-claimed against the other three defendants and a third-party claim against the architect.⁴⁰ The prime contractor then counterclaimed against Alexander.⁴¹

This conglomeration of claims included subcontracts signed among different parties at different times, resulting in different damages, and involving different evidence on performance and breach.⁴² 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."⁴³

The Sixth Circuit reversed.⁴⁴ In effect, the appeals court asked the proper question: How many city halls were built?⁴⁵ The court began with the recognition that under the Federal Rules of Civil Procedure "the rights of all parties generally should be adjudicated in one action"⁴⁶ 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."⁴⁷ All parts of the dispute arose from a single construction project, which presented a single set of overlapping facts.⁴⁸ That is one transaction or occurrence.

³⁷ *LASA Per L'Industria Del Marmo Societa Per Azioni v. Alexander*, 414 F.2d 143 (6th Cir. 1969).

³⁸ *Id.* at 145.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *See id.* at 145-46.

⁴³ *Id.* at 145.

⁴⁴ *Id.* at 147.

⁴⁵ *See id.* at 147.

⁴⁶ *Id.* at 146.

⁴⁷ *Id.* at 147.

⁴⁸ *Id.*

One transaction or occurrence is also presented in various other cross-claim situations: the creation of a mortgage and a later buyer's promise to pay that mortgage involve the same ship,⁴⁹ a corporation that is sued for false registration statements asserts a breach of fiduciary duty against the individuals responsible for the statements,⁵⁰ the beneficiaries on six separate insurance policies are all changed at one time,⁵¹ and employers who are sued for nonpayment of union pension contributions assert an industry trust fund's responsibility for the payments.⁵² 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.⁵³

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.⁵⁴ Other considerations that have been improperly used to prevent joinder of a cross-claim are that it would

⁴⁹ *Ponce Fed. Bank v. Vessel "Lady Abby,"* 980 F.2d 56, 57 (1st Cir. 1992).

⁵⁰ *Bernstein v. Crazy Eddie, Inc.,* 702 F. Supp. 962, 968 (E.D.N.Y. 1988).

⁵¹ *Jefferson Standard 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.").

⁵² *Sheet Metal Workers Local 44 v. Scranton Sheet Metal,* 881 F. Supp. 959, 960-61 (M.D. Pa. 1994).

⁵³ 6 WRIGHT ET AL., *supra* note 11, § 1431 ("[A cross-claim] can be interposed regardless of its nature. . . . Neither is it relevant that the claim and crossclaim are based on radically different legal theories.").

⁵⁴ *See, e.g., Caton Ridge Nursing Home, Inc. v. Califano,* 447 F. Supp. 1222, 1228 (D. Md. 1978) (holding that when authorities moved to decertify a nursing home from providing Medicaid-supported care, a cross-claim for money due for care of the same residents was disallowed, because "[t]he issues, both factual and legal, as well as the evidence relevant to them, [were] distinct from those in the original action"); *Allstate Ins. Co. v. Daniels,* 87 F.R.D. 1, 5 (W.D. Okla. 1978) (holding a cross-claim for negligence involving an accident was disallowed in the action commenced by the insurance company for declaration of noncoverage for the same accident, because "[i]t [could not] be said that the issues of fact necessary to determine the legal questions present in both the original action and the cross-claim [were] identical"). One commentary only mildly rebukes this decision by noting that "it is possible to conclude that the injured party's claim of negligence involves a totally different factual investigation" 6 WRIGHT ET AL., *supra* note 11, § 1432. 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?

complicate the action,⁵⁵ hinder enforcement of the public policy supporting the original claim,⁵⁶ and improperly extend federal jurisdiction.⁵⁷ Other decisions disallowing cross-claims beggar explanation.⁵⁸ These decisions miss the point and should be denounced. The only

Another wrong decision is *Mount Vernon Fire Insurance Co. v. A.S. Construction, Inc.* *Mount Vernon Fire Ins. Co. v. A.S. Constr., Inc.*, No. 05 CV 3190(ARR)(KAM), 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. *Id.* at *1. The contractor's insurance company sued the contractor and both sets of homeowners for a declaration of nonliability; the owners of the damaged house cross-claimed against both the contractor and the contracting homeowners. *Id.* 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 *3 (quoting *Fireman's Fund Ins. Co. v. Trobaugh*, 52 F.R.D. 31, 33 (W.D. Okla. 1971)). 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. *Id.* at *4. First, 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." *Yetnikoff v. Mascardo*, No. 06 Civ.13494 GEL, 2007 WL 690135, at *2 (S.D.N.Y. Mar. 6, 2007). Second, in refusing supplemental jurisdiction over a cross-claim asserting that the original claim was a waste of corporate assets, the court disingenuously asserted that "[a]t a sufficiently general level, everything is logically related to everything else." *Harry Winston, Inc. v. Kerr*, 72 F. Supp. 2d 263, 264-66 (S.D.N.Y. 1999). This is true enough but hardly applicable to the flip side of the case. ⁵⁵ *See, e.g., Aetna Ins. Co. v. Pa. Mfrs. Ass'n Ins. Co.*, 456 F. Supp. 627, 635 (E.D. Pa. 1978).

⁵⁶ *See, e.g., SEC v. Gen. Host Corp.*, 60 F.R.D. 640, 643 (S.D.N.Y. 1973), *aff'd*, 508 F.2d 1332 (2d Cir. 1975); *SEC v. Nat'l Student Mktg. Corp.*, 59 F.R.D. 305, 307 (D.D.C. 1973).

⁵⁷ *See, e.g., Danner v. Anskis*, 256 F.2d 123, 124 (3d Cir. 1958); *Main v. Festa*, 37 F.R.D. 227, 229 (W.D. Pa. 1965). Both *Danner* and *Main* 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. *Danner*, 256 F.2d at 124; *Main*, 37 F.R.D. at 229. Most likely, these two early decisions should be ignored; they precede 28 U.S.C. § 1367 (2000), which was codified in 1990. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 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*. *Miller v. Carson*, 515 F. Supp. 1375, 1377 (M.D. Fla. 1981).

proper consideration is whether the different claims arise from the same transaction or occurrence: interrelated facts that a layperson 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.⁵⁹

⁵⁸ See *Brandeis Mach. & Supply Corp. v. Campbell*, 87 F.R.D. 725 (N.D. Ill. 1980). This is a bad decision. The court found 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. *Id.* at 726. The court came to this conclusion even though “[t]here is no doubt that the complaint and the cross-claim have a common element: Each involves a determination whether Casine was a validly-formed limited partnership.” *Id.*

A worse decision is *Design for Business Interiors, Inc. v. Herson’s, Inc.* Design for Bus. Interiors, Inc. v. Herson’s, Inc., 659 F. Supp. 1103 (D.D.C. 1986). When an automobile dealership remodeled, the original claim involved the furniture, cabinets, and partitions for the showroom; the proposed cross-claim involved floor tile. *Id.* at 1104-05. The court baldly declared that “[it] 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 action is wholly unrelated” to the payment for furniture. *Id.* The court found that one showroom and one redecorating project equaled two transactions or occurrences!

The worst decision is *Kirkcaldy v. Richmond County Board of Education*. *Kirkcaldy v. Richmond Cnty. 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. *Id.* at 291-92. The secretary sued both the board and the principal. *Id.* at 291. The principal sought to cross-claim against the board for violation of his civil rights in the termination. *Id.* at 291-92. 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. *Id.* at 296. 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.* The court admitted the claims were “necessarily related to some extent in a causal and chronological way,” yet concluded the claim would “focus on what occurred between her and [the principal],” and the cross-claim was “logically attenuated” since it involved due process in the termination. *Id.* at 297.

⁵⁹ See FED. R. CIV. P. 13(i). As with other joinder rules, pleading a cross-claim is routinely to be allowed with possible later severance for separate trials. See 6 WRIGHT ET AL., *supra* note 11, § 1431. Federal Rule of Civil Procedure 13(i) both reinforces this general policy and also interlocks counterclaims and cross-claims with

C. *Permissive Joinder of Parties*

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

(a) Persons Who May Join or Be Joined.

(1) Plaintiffs. Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the *same transaction, occurrence, or series of transactions or occurrences*; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) 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:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the *same transaction, occurrence, or series of transactions or occurrences*; and

(B) any question of law or fact common to all defendants will arise in the action.⁶⁰

interlocutory appeals under Federal Rule of Civil Procedure 54(b): “If the court orders separate trials under Rule 42(b), it may enter judgment on a counterclaim or crossclaim under Rule 54(b) when it has jurisdiction to do so, even if the opposing party’s claims have been dismissed or otherwise resolved.” FED. R. CIV. P. 13(i). One decision turns a motion to sever upside down by reasoning that the motion under Federal Rule of Civil Procedure 42(b) “admits that the trial of the plaintiffs’ claims involves factual and legal issues separate from those of the cross-claim.” *Weiss v. Advest, Inc.*, 607 F. Supp. 799, 802 (E.D. Pa. 1984).

⁶⁰ FED. R. CIV. P. 20(a) (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. *MOORE ET AL.*, *supra* note 15, § 20.04(1).

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.⁶¹ While former equity Rule 37 governed joinder of parties, the advisory committee did not follow it.⁶² The “transaction” and “common question” requirements of the federal rule first appeared in the second draft.⁶³ 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.”⁶⁴

⁶¹ *E.g.*, CLARK, *supra* note 10, §§ 56-61; MOORE ET AL., *supra* note 15, § 20 app. 100; 7 WRIGHT ET AL., *supra* note 11, § 1651.

⁶² *E.g.*, CLARK, *supra* note 10, §§ 56-61; MOORE ET AL., *supra* note 15, § 20 app. 100; 7 WRIGHT ET AL., *supra* note 11, § 1651.

⁶³ Bone, *supra* note 29, at 106 n.359.

⁶⁴ FED. R. CIV. P. 20(a) advisory committee’s note (1937). “*Note to Subdivision (a)*. The first sentence is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 1. Compare Calif. Code Civ. Proc. (Deering, 1937) §§ 378, 379a; Ill. Rev. Stat. (1937) ch. 110, §§ 147-148; N.J. Comp. Stat. (2 Cum. Supp., 1911-1924), Title 163, §§ 280, 282; N.Y.C.P.A. (1937) §§ 209, 211.” *Id.* 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

. . . .

Supreme Court of Judicature Act (Annual Practice, 1937) O. 16, r. 1 (Eng.).

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

(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 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,⁶⁵ and also to respond to tight-fisted interpretations of party joinder in some code decisions.⁶⁶

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.⁶⁷ Advisory committee reporter Charles E. Clark thought the permissive joinder of parties rule closely approached free joinder and the only substantial re-

CAL. CIV. PROC. CODE §§ 378(a), 379(a) (Deering 1937).

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

N.Y. CIV. PRAC. ACT §§ 209, 211 (1937).

⁶⁵ See MOORE ET AL., *supra* note 15, § 20 app. 103 (opining that the combination of English rules in essence provided unlimited party joinder and that the language of the new federal rule was even broader); 7 WRIGHT ET AL., *supra* note 11, § 1652.

⁶⁶ See, e.g., *Ader v. Blau*, 148 N.E. 771 (N.Y. 1925). This notorious case 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. *Id.* at 772. “[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 Alan Wright, *Estoppel by Rule: The Compulsory Counterclaim Under Modern Pleading*, 39 IOWA L. REV. 255, 283 n.121 (1954).

⁶⁷ See 7 WRIGHT ET AL., *supra* note 11, § 1652. The research assistant in the work of the advisory committee was James Wm. Moore, later a leading commentator on the rules. See *Bone*, *supra* note 29, at 105. Moore opines, “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 15, § 20 app. 104; see also 7 WRIGHT ET AL., *supra* note 11, §§ 1652, 1653.

striction would prove to be the common question requirement, not the transaction or occurrence requirement.⁶⁸

The rule is based on facts, not historic legal relationships.⁶⁹ Perhaps one treatise states the rule best: “[T]he demands of several parties arising out of the *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.”⁷⁰ Another commentator also has it right: “The transaction test in Rule 20(a) made the

⁶⁸ See Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 569 (1939) (“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 plaintiffs where there is a common question of law or fact affecting all of them, or you may join parties defendant on the same basis.”); see also Bone, *supra* note 29, at 105 (stating that Clark’s assistant James Wm. Moore also believed the only real restriction was the common question requirement); see also Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure II. Pleadings and Parties*, 44 YALE L.J. 1291, 1319 (1935).

⁶⁹ MOORE ET AL., *supra* note 15, § 20.02[1][a] (“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.”).

An example may be instructive:

Thus three passengers injured in a taxicab accident may join as co-plaintiffs in suing the driver. They were injured in the same transaction, and their claims present the common question of the driver’s negligence. Similarly, they may join as co-defendants the driver and the company that employed him, since the claims against these defendants arose from the same transaction and present the common question of the driver’s negligence.

Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 823 (1989). 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.” *Id.* 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, i.e., one transaction or occurrence.

⁷⁰ 7 WRIGHT ET AL., *supra* note 11, § 1652 (emphasis added).

focal element the cluster of real world events that constituted the social dispute, the ‘transaction, occurrence, or series of transactions or occurrences.’”⁷¹ The transaction or occurrence is one litigable event, one cluster of real world events, one set of facts. As with joinder of cross-claims,⁷² and joinder of compulsory counterclaims, the proper question is how many events took place?⁷³

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.”⁷⁴ 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.⁷⁵ This gloss is certainly not necessary and hardly helpful; it adds nothing to the words transaction or occurrence.⁷⁶ 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.

A series of transactions or occurrences can be identified in many types of situations. A plaintiff joins multiple defendants whose actions contributed to the plaintiff’s injuries, even though they did not act in concert or at the same time.⁷⁷ Multiple plaintiffs assert a pattern of

⁷¹ Bone, *supra* note 29, at 106 n.360.

⁷² See *supra* Part II.B.

⁷³ McFarland, *supra* note 7, at 730-32.

⁷⁴ FED. R. CIV. P. 20(a).

⁷⁵ E.g., MOORE ET AL., *supra* note 15, § 13.10[1][b]; 6 WRIGHT ET AL., *supra* note 11, § 1410.

⁷⁶ See McFarland, *supra* note 7, at 709-14.

⁷⁷ See 7 WRIGHT ET AL., *supra* note 11, § 1653 (citing *Poster v. Cent. Gulf S.S. Corp.*, 25 F.R.D. 18 (E.D. Pa. 1960); *McNeil v. Am. Exp. Lines, Inc.*, 166 F. Supp. 427 (E.D. Pa. 1958); *Lucas v. City of Juneau*, 127 F. Supp. 730, 732 (D. Alaska 1955)); see also *United States ex rel. Saunders Concrete Co. v. Tri-State Design Constr. Co.*, 899 F.

misconduct by the same defendant.⁷⁸ A plaintiff asserts damages against subsequent owners of the plant where he worked.⁷⁹ Multiple plaintiffs assert the same wrong perpetrated on them by the same defendant.⁸⁰ These are all transactions or occurrences tied together in a logical relationship, best summed up by the following U.S. district court:

Supp. 916, 919 (N.D.N.Y. 1995) (holding the inspector was properly joined with the supplier of concrete since the case against both arose from one concrete pour). *Compare* McDowell v. Davol, Inc., No. 3:08-CV-90, 2008 WL 2713708, at *5 (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., No. CA 08-0337-KD-C, 2008 WL 4016599, at *2-3 (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.

⁷⁸ *E.g.*, Tridle v. Union Pac. R.R., No. 8:08CV470, 2009 WL 1783558, at *2 (D. Neb. June 22, 2009) (identifying series when each plaintiff alleged similar injury from the defendant's work risk factors); Dada v. Wayne Twp. Trs. Office, No. 1:07-CV-274, 2008 WL 2323485, at *2-3 (N.D. Ind. May 30, 2008) (identifying series when plaintiffs fired on successive days involved same time frame, same alleged misconduct, and same supervisor); *M.K. v. Tenet*, 216 F.R.D. 133, 142 (D.D.C. 2002) ("The court concludes that the alleged repeated 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. Educ. Serv. Unit No. 16*, 144 F.R.D. 680, 688-89 (D. Neb. 1992) ("In this instance, 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 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, 781-82 (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).

⁷⁹ *Wright, Joinder of Claims, supra* note 5, at 602 ("[E]mployment in one plant by successive owners is surely a 'series of transactions or occurrences' if, indeed, it is not a single transaction.")

⁸⁰ *E.g.*, *Moore v. Comfed Sav. Bank*, 908 F.2d 834, 839 (11th Cir. 1990) (explaining how plaintiffs taking out loans from the bank are part of the same series); *Adrain v. Genetec Inc.*, No. 2:08-CV-423, 2009 WL 3063414, at *2 (E.D. Tex. Sept. 22, 2009) (deciding in conclusory fashion multiple patent infringing sellers were part of same transaction or occurrence based on a logical relationship, but more accurately could have found a series); *Coll v. Abaco Operating LLC*, No. 2:08-CV-345 (TJW), 2009 WL 2857821, at *2-3 (E.D. Tex. Sept. 1, 2009) (discussing claims against 117 oil and gas producing defendants for failure to comply with tax refund law); *Dougherty v.*

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.⁸¹

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.⁸²

Mieczkowski, 661 F. Supp. 267, 279-80 (D. Del. 1987) (suggesting multiple customers suing stock broker are part of the same series).

⁸¹ Hanley v. First Investors Corp., 151 F.R.D. 76, 79 (E.D. Tex. 1993) (footnote omitted). “Here there is a 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.” *Id.* at 80.

⁸² See *supra* notes 77-81 and accompanying text. While 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, 1350 (9th Cir. 1997) (explaining that forty-nine plaintiffs sued for delay in naturalization proceedings but did not claim a common pattern of conduct by the defendant); Lover v. District of Columbia, 248 F.R.D. 319, 324 (D.D.C. 2008) (discussing how a plaintiff sought to add others who suffered similar but separate rights violations by police over more than a year before the plaintiff and without allegation of connection or pattern of conduct to plaintiff); Harris v. Spellman, 150 F.R.D. 130, 131-32 (N.D. Ill. 1993) (discussing two inmates who challenged discipline imposed on them for separate incidents related only because they happened at the 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.*, Coal. for a Sustainable Delta v. U.S. Fish & Wildlife Serv., No. 1:09-CV-480 OWW GSA, 2009 WL 3857417, at *8 (E.D. Cal. Nov. 17, 2009) (refusing joinder of several defendants whose separate actions affected fish, but then reaching the same result by ordering

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, “[t]ransaction’ 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.”⁸³ Most quotes end there.⁸⁴ The next sentence is, “[t]he refusal to furnish the quotations is one of the links in the chain which constitutes the transaction”⁸⁵ This concept of links in the chain is a good way to think about a series of transactions or occurrences, as the Supreme Court later recognized as much.⁸⁶

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, which was to handle all aspects of a dispute in one proceeding; the words of the rule were carefully chosen for this purpose.⁸⁷ Despite this clear intent, over the years, courts have been more and more willing to seize on the words of the rule for exclusion, rather than

coordination of separate cases for case management to avoid waste of judicial resources); *Deskovic v. City of Peekskill*, 673 F. Supp. 2d 154, 170 (S.D.N.Y. 2009) (discussing how an exonerated inmate attempted to join defendants who had participated in his conviction and a guard who had abused him in prison); *Boschert v. Pfizer, Inc.*, No. 4:08-CV-1714 CAS, 2009 WL 1383183, at *4 (E.D. Mo. May 14, 2009) (refusing joinder of four plaintiffs who each took the same drug obtained from different providers); *United States v. Katz*, 494 F. Supp. 2d 645, 648-49 (S.D. Ohio 2006) (explaining joinder was refused because fraudulent conveyances were separate and distinct even though all involved cleanup of one hazardous site); *Wynn v. Nat’l Broad. Co.*, 234 F. Supp. 2d 1067, 1080 (C.D. Cal. 2002) (refusing joinder of multiple plaintiffs for industry wide age discrimination against multiple defendants).

⁸³ *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 610 (1926).

⁸⁴ See, e.g., *United States v. Houston*, 625 F.3d 871, 874 n.4 (5th Cir. 2010); *Fox v. Maulding*, 112 F.3d 453, 457 (10th Cir. 1997); *Mosley v. Gen. Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974).

⁸⁵ *Moore*, 270 U.S. at 610.

⁸⁶ *Baker v. Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974) (“[T]his Court held that ‘transaction’ is a word of flexible meaning which may comprehend a series of occurrences if they have logical connection.” (citing *Moore*, 270 U.S. at 610)).

⁸⁷ See *supra* Part II.A.

for inclusion, of additional parties; they continue to be “skeptical of a natural unity to disputes.”⁸⁸

The court started well in *Mosley v. General Motors Corp.*⁸⁹ Ten plaintiffs sued on behalf of themselves and others similarly situated for racially discriminatory practices by their employer.⁹⁰ 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.”⁹¹ The court also wrote of the proper attitude in cases involving joinder of parties:

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.⁹²

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.”⁹³ All of this language was appropriate and helpful. Indeed, for many years, every permissive joinder of parties decision routinely cited *Mosley*,⁹⁴ and it remains the lead-

⁸⁸ Bone, *supra* note 29, at 106-07 n.360.

⁸⁹ *Mosley*, 497 F.2d 1330.

⁹⁰ *Id.* at 1331.

⁹¹ *Id.* at 1334.

⁹² *Id.* at 1132-33 (citations omitted) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966)).

⁹³ *Id.* at 1333.

⁹⁴ See, e.g., *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 218 n.5 (4th Cir. 2007); *Saval v. BL Ltd.*, 710 F.2d 1027, 1031 (4th Cir. 1983); *Barnhart v. Town of Parma*, 252 F.R.D. 156, 160 (W.D.N.Y. 2008); *M.K. v. Tenet*, 216 F.R.D. 133, 141-42 (D.D.C. 2002); *Dougherty v. Mieczkowski*, 661 F. Supp. 267, 277-78 (D. Del. 1987).

ing case today. The problem is that the *Mosley* opinion is thin,⁹⁵ and courts citing it frequently only quote the general language defining transaction, while proceeding to ignore both the result of the case and the attitude toward broad joinder.

To be sure, many decisions demonstrate an appropriately generous attitude toward party joinder.⁹⁶ Unfortunately, far more are hostile to party joinder—and thus to the general philosophy of the federal rules.⁹⁷ How else can one explain decisions based on inappropriate considerations?⁹⁸ Lower courts keep making restrictive joinder of parties decisions, and the drafters of the rules keep amending the rules to eliminate these restrictive interpretations.⁹⁹ While raw numbers are a crude

⁹⁵ See generally *Mosley*, 497 F.2d 1330 (opinion is approximately two pages in length).

⁹⁶ See, e.g., *Foulke v. Dugan*, 212 F.R.D. 265, 269 (E.D. Pa. 2002) (joining malpractice claim against a lawyer with a claim against the original defendant for concealment of evidence in negligence action); *M.K.*, 216 F.R.D. at 135 (suing employer for same obstruction of counsel); *Puricelli v. CNA Ins. Co.*, 185 F.R.D. 139, 140 (N.D.N.Y. 1999) (claiming age discrimination of multiple employees by same employer); *Guedry v. Marino*, 164 F.R.D. 181, 183 (E.D. La. 1995) (suing sheriff for wrongful termination of deputies on common ground); *United States ex rel. Saunders Concrete Co. v. Tri-State Design Constr. Co.*, 899 F. Supp. 916, 917, 919 (N.D.N.Y. 1995) (joining inspector and supplier for single concrete pour); *Jonas v. Conrath*, 149 F.R.D. 520, 524 (S.D. W. Va. 1993) (joining malpractice tort against optometrist and contract action against health insurer for treatment); 7 *WRIGHT ET AL.*, *supra* note 11, § 1653 (collecting cases); see also *supra* Part II.C.2.

⁹⁷ E.g., *Burns v. W.S. Life Ins. Co.*, 298 F. Supp. 2d 401, 403 (S.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, 408 (E.D. Cal. 1994) (denying joinder of driver and insurance carrier for bad faith defense for same auto accident); *State ex rel. Campbell v. James*, 263 S.W.2d 402, 408 (Mo. 1953) (refusing joinder of defendants in single blasting incident because of different insurance contracts).

⁹⁸ E.g., *Don King Prods., Inc. v. Colon-Rosario*, 561 F. Supp. 2d 189, 192-93 (D.P.R. 2008) (denying joinder of action against pirates of television signal for same events 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. Wis. 1999) (denying joinder of smokers against tobacco company because of possible jury confusion).

⁹⁹ Just as courts made restrictive joinder decisions under the codes, see *supra* note 66, courts made restrictive joinder decisions under the even broader joinder provisions of the new rules. The permissive joinder of parties rule, Federal Rule of Civil Procedure 20(a), was amended in 1966, along with other joinder rules to “root out remnants of

measure, they can be instructive. The main volume of a leading treatise on federal procedure collected thirty-five cases interpreting the transaction or occurrence requirement in permissive joinder cases: ten courts concluded the requirement was satisfied and twenty-five courts concluded it was not.¹⁰⁰ 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, while the number of cases concluding the opposite is twenty-eight.¹⁰¹ The convenience and economy of joinder that could be achieved in many of these twenty-eight cases is readily apparent.¹⁰²

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.¹⁰³ One case allowed joinder.¹⁰⁴ A dozen others denied permissive joinder, reasoning that the pirates did not act in concert or that joinder would cause confusion and additional expense.¹⁰⁵

the old formalistic approach that had crept into application of the 1938 rules.” Freer, *supra* note 69, at 815; *see also* 7 WRIGHT ET AL., *supra* note 11, § 1655.

¹⁰⁰ 7 WRIGHT ET AL., *supra* note 11, § 1653, at 401 n.2, 404 n.5.

¹⁰¹ *Id.* at 55-56 n.5 (Supp. 2010).

¹⁰² *E.g.*, Reed v. Am. Med. Sec. Grp., Inc., 324 F. Supp. 2d 798 (S.D. Miss. 2004) (alleging same misrepresentations to purchasers of policies with same provisions); Grennell v. W.S. Life Ins. Co., 298 F. Supp. 2d 390 (S.D. W. Va. 2004) (describing plaintiffs who all purchased “vanishing premium” life insurance policies from same defendant); *Insolia*, 186 F.R.D. 547 (finding smokers’ suits all alleged same industry-wide conspiracy).

¹⁰³ *See infra* notes 105-06 and accompanying text.

¹⁰⁴ DIRECTV, Inc. v. Barrett, 220 F.R.D. 630 (D. Kan. 2004).

¹⁰⁵ *E.g.*, Don King Prods., Inc. v. Colon-Rosario, 561 F. Supp. 2d 189, 192 (D.P.R. 2008) (stating the transactions were no more related than separate buyers of milk from grocery stores); DIRECTV, Inc. v. Boggess, 300 F. Supp. 2d 444, 450 (S.D. W. Va. 2004) (stating there was no concert of action by the alleged pirates); DIRECTV, Inc. v. Beecher, 296 F. Supp. 2d 937, 945 (S.D. Ind. 2003) (stating joinder is improper because the defendants made separate purchases of pirating devices); DIRECTV, Inc. v. Loussaert, 218 F.R.D. 639, 642-43 (S.D. Iowa 2003) (stating joinder is improper because it would result in confusion of issues plus additional expenses upon the court); DIRECTV, Inc. v. Armellino, 216 F.R.D. 240, 241 (E.D.N.Y. 2003) (“[C]laims turn on the fact-specific question of whether each defendant intercepted DIRECTV’s broadcasts.”); Tele-Media Co. v. Antidormi, 179 F.R.D. 75, 76-77 (D.

The situation of multiple parties, who have each acted independently, does appear to present separate transactions.¹⁰⁶ Yet none of these courts considered that the defendants had all acted to injure the same plaintiff by stealing the exact same product.¹⁰⁷ The factual grouping could be the television broadcast, not the individual acts of pirating.¹⁰⁸ Even if a court does not accept that grouping, the rule allows joinder of a “series of transactions or occurrences.”¹⁰⁹ None of these decisions considered that portion of the rule.¹¹⁰ 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 a trial convenience problem, not a pleading hurdle.¹¹¹ “The purpose . . . is to make ‘one lawsuit grow where two grew before.’”¹¹² Denying joinder of 1795 defendants purloining the same signal from the same plaintiff makes 1795 suits grow where only one grew before.¹¹³ True enough, handling all defendants in one suit will present management issues; that factor should be weighed against hundreds of separate lawsuits each starting over with the same pleadings and proof of the same facts. The courts would do far better to follow the reasoning of the one case that approved joinder.¹¹⁴

Conn. 1998) (stating joinder is improper because there is no alleged concert of actions even though “pragmatic considerations may arguably point toward [joinder]”); *Movie Sys., Inc. v. Abel*, 99 F.R.D. 129, 130 (D. Minn. 1983) (stating joinder is improper because the 1795 defendants acted independently to steal the signal).

¹⁰⁶ See, e.g., *Bogges*, 300 F. Supp. 2d at 449.

¹⁰⁷ See *supra* note 105 and accompanying text.

¹⁰⁸ Cf. *supra* note 105 and accompanying text (describing cases that did not take this into consideration).

¹⁰⁹ FED. R. CIV. P. 20(a)(1)(A).

¹¹⁰ See *supra* note 105.

¹¹¹ See *supra* Part II.A.

¹¹² *Wright, Joinder of Claims, supra* note 5, at 580.

¹¹³ See *Movie Sys., Inc. v. Abel*, 99 F.R.D. 129, 130 (D. Minn. 1983).

¹¹⁴ See *DIRECTV, Inc. v. Barrett*, 220 F.R.D. 630, 631-32 (D. Kan. 2004). The court recognized that other federal district courts uniformly deny joinder in similar cases. *Id.* at 632. The court considered, however, the overlapping evidence, duplication of

In summary, the drafters of the permissive joinder rule selected “transaction, occurrence, or series of transactions or occurrences” as terms of inclusion intended to lead to nearly free joinder of parties.¹¹⁵ 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.¹¹⁶ 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.”¹¹⁷ 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.”¹¹⁸ And the original plaintiff may assert directly against the third-party defendant: “[A]ny claim arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the third-party plaintiff.”¹¹⁹ Sometimes these claims are loosely termed counterclaims or cross-claims, but a better term is Rule 14 claims.¹²⁰

testimony, delay, inconvenience, and expense that separate trials would generate. *Id.* at 631. “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 likely introduce similar or identical evidence against each of the defendants in each case.” *Id.* at 632.

¹¹⁵ See FED. R. CIV. P. 20(a)(1)(A).

¹¹⁶ See *Pa. Emps. Benefit Trust Fund v. Eli Lilly & Co.*, No. 07-2057, 2007 WL 2916195, at *1 (E.D. Pa. Oct. 5, 2007). In this rare case, the insurance company alleged three defendants separately, and without conspiracy or action in concert, marketed their own product deceptively so that insured participants purchased them and submitted claims for reimbursement. *Id.*

¹¹⁷ FED. R. CIV. P. 14(a)(1).

¹¹⁸ FED. R. CIV. P. 14(a)(2)(D).

¹¹⁹ FED. R. CIV. P. 14(a)(3).

¹²⁰ 6 WRIGHT ET AL., *supra* note 11, § 1458.

As with other joinder devices, the key requirement for a Rule 14 claim is the transaction or occurrence, which again “is to avoid circuitry of action and multiplicity of suits.”¹²¹ 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.”¹²² Again, the court should look to the facts—not the legal theories—of the litigation.

The archetypal Rule 14 claim case is *Revere Copper & Brass Inc. v. Aetna Casualty & Surety Co.*¹²³ 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.¹²⁴ When Revere sued on the bonds against Aetna, Aetna brought Fuller in as a third-party defendant because of its agreement to indemnify Aetna.¹²⁵ Third-party defendant Fuller in turn brought a Rule 14 claim against plaintiff Revere for breach of warranty and negligence.¹²⁶ 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; additions to or subtractions from the central core of fact do not change this substantial identity”¹²⁷ As had the court in the leading cross-claim case,¹²⁸ 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.”¹²⁹

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709 (5th Cir. 1970).

¹²⁴ *Id.* at 710.

¹²⁵ *Id.* at 711.

¹²⁶ *Id.*

¹²⁷ *Id.* at 713 (quoting *Clark v. Taylor*, 163 F.2d 940, 942-43 (2d Cir. 1947)).

¹²⁸ *See LASA Per L’Industria Del Marmo Societa Per Azioni v. Alexander*, 414 F.2d 143 (6th Cir. 1969); *see also supra* notes 37-48 and accompanying text.

¹²⁹ *Revere Copper*, 426 F.2d at 715-16.

Focusing 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.¹³⁰ 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.”¹³¹

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 a plaintiff corporation sued a defendant bank for negligently permitting one of the plaintiff’s managers (Kerr) to draw checks on the plaintiff’s account payable to the manager’s controlled corporations, the bank asserted a third-party claim against the manager and the controlled corporations.¹³² The third parties in turn filed a Rule 14 claim against the plaintiff for services rendered in establishing and managing a branch office for the plaintiff.¹³³ 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

¹³⁰ See *Pitcavage v. Mastercraft Boat Co.*, 632 F. Supp. 842, 849-50 (M.D. Pa. 1985).

¹³¹ *Borden Co. v. Sylk*, 42 F.R.D. 429, 431 (E.D. Pa. 1967) (quoting *Great Lakes Rubber Corp. v. Herbert Cooper Co.*, 286 F.2d 631, 634 (3d Cir. 1961)).

¹³² *Heintz & Co. v. Provident Tradesmens Bank & Trust Co.*, 30 F.R.D. 171, 171-72 (E.D. Pa. 1962).

¹³³ *Id.* at 172.

hence we conclude that, if otherwise maintainable, the Kerr claims fall within the ambit of Rule 14.¹³⁴

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.¹³⁵

III. PLEADING

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.”¹³⁶

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.”¹³⁷ The rule does not use the ubiquitous “transaction or occurrence.” Yet

¹³⁴ *Id.* In contrast is *Finkel v. United States*. *Finkel v. United States*, 385 F. Supp. 333 (S.D.N.Y. 1974). Taxpayers sued to cancel a tax penalty against a corporation. *Id.* at 335. The government counterclaimed against the two taxpayers and also impleaded another person alleged to be in control of the corporation. *Id.* 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. *Id.* 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. *Id.* at 336. Not as obviously wrong, but still clearly outside the policies of the rule, is *Brown v. First National Bank*. *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. *Id.* at 340. The bank impleaded the recipient of the funds. *Id.* The third-party recipient filed a “crossclaim” (Rule 14 claim) against the original plaintiff for an accounting of their partnership. *Id.* The court concluded that the evidence of the original claim would have “no factual relation to the evidence in the other,” even though all sought the same funds. *Id.* at 341.

¹³⁵ See generally 6 WRIGHT ET AL., *supra* note 11, §§ 1458-59.

¹³⁶ *Atwater v. N. Am. Coal Corp.*, 111 F.2d 125, 126 (2d Cir. 1940) (Clark, J., concurring).

¹³⁷ FED. R. CIV. P. 8(a)(2).

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.¹³⁸

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.¹³⁹ This view of the cause of action was essentially identical to “right of action”¹⁴⁰ and was law-based. Other scholars, including Professor Charles E. Clark, argued a cause of action was a grouping of facts that a lay person would expect to try together.¹⁴¹ This view of the cause of action was fact based.¹⁴² 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 un glossed) term “claim for relief.”¹⁴³

¹³⁸ See McFarland, *supra* note 7, 701-08; Douglas D. McFarland, *The Unconstitutional Stub of Section 1441(c)*, 54 OHIO ST. L.J. 1059, 1061-68 (1993).

¹³⁹ 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.” *Id.*

¹⁴⁰ “[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, AN EXPOSITION OF THE PRINCIPLES OF 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 (N.Y. 1916).

¹⁴¹ CLARK, *supra* note 10, § 19, 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.” *Id.* 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.

¹⁴² *Id.*

¹⁴³ See FED. R. CIV. P. 8(a).

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.

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.¹⁴⁴ This is no accident. Both are integral to the procedural philosophy embodied throughout the federal rules: the philosophy of the defining unit of litigation being a grouping of facts, the primacy of substantive law over procedure, the 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.¹⁴⁵

Courts, commentators, and attorneys that 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.¹⁴⁶ This failure leads to narrow, nitpicking decisions that do harm

Collins v. Metro-Goldwyn Pictures Corp., 106 F.2d 83, 87 (2d Cir. 1939) (Clark, J., concurring).

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 of Civil Procedure: “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.” *Id.* at 724. This test has in turn been replaced with the largely, if not completely, synonymous statutory standard of “same [constitutional] case or controversy under Article III.” 28 U.S.C. § 1367(a) (2006).

¹⁴⁴ See CLARK, *supra* note 10, §§ 19, 102. 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.” *Id.*

¹⁴⁵ *E.g.*, *id.* 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 25, at 297 (claiming procedure rules to be “continually restricted to their proper and subordinate role” to substantive rules); see also Bone, *supra* note 29, at 100; Smith, *supra* note 29, at 916; Subrin, *supra* note 29, at 962; Wright, *supra* note 66, at 275.

¹⁴⁶ See *supra* Parts I, II.A.

to procedure in multiple areas, including pleading, joinder, preclusion, and jurisdiction.¹⁴⁷

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.¹⁴⁸ 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. Rule 10(b) brings the claim and the transaction or occurrence together in instructing 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.¹⁴⁹

Once again, the rule employs the claim as part of the effort to obliterate the cause of action.¹⁵⁰ Once again, interpretation under the rule depends on proper understanding of a “claim” as a grouping of

¹⁴⁷ See *infra* Part III.B-C (discussing pleading); *supra* Part II (discussing joinder devices); McFarland, *supra* note 7, at 717 (discussing compulsory counterclaims); *infra* Part IV (discussing interlocutory appeal in multiple claim cases); *infra* Part V (discussing briefly preclusion and supplemental jurisdiction).

¹⁴⁸ See FED. R. CIV. P. 10(b), 15(c)(1).

¹⁴⁹ FED. R. CIV. P. 10(b) (emphasis added).

¹⁵⁰ 5A WRIGHT ET AL., *supra* note 11, § 1324, states,

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.

facts, not a legal theory.¹⁵¹ A recent decision stated this concept with economy and precision: “*One set of facts producing one injury creates one claim for relief, no matter how many laws the deeds violate.*”¹⁵²

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, i.e., separate transactions or occurrences, are different claims, and a single factual grouping is the same transaction or occurrence, i.e., the same claim. If so, the redundant parts are consistent, and the repetition is harmless. One set of facts is one claim. One claim is one transaction or occurrence.

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*, the 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.¹⁵³ The 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.¹⁵⁴ The magistrate judge properly denied the motion, but defendant persisted.¹⁵⁵ The dis-

¹⁵¹ See, 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 [word] ‘claim.’ It is used to denote the aggregate of operative facts which give rise to a right enforceable in the courts.” *Id.*; see also 5A WRIGHT ET AL., *supra* note 11, § 1324; *supra* Part III.A.

¹⁵² *Orthodontic Ctrs. of Ill., Inc. v. Michaels*, 407 F. Supp. 2d 934, 936 (N.D. Ill. 2005) (quoting *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 292 (7th Cir. 1992)) (denying appealability under Federal Rule of Civil Procedure 54(b) of separate “claims”); see *infra* Part IV.

¹⁵³ *Tompkins v. Cent. Laborers’ Pension Fund*, No. 09-cv-4004, 2009 WL 3836893, at *2 (C.D. Ill. Nov. 16, 2009).

¹⁵⁴ *Id.* at *3.

¹⁵⁵ *Id.* at *2. The magistrate judge recognized “‘it would have been clearer for Plaintiff to set out each statutory subsection into separate counts,’” but denied the defendant’s motion to dismiss under Rule 10(b) stating “‘the language of Rule 10(b) ‘literally applies to separate transactions or occurrences, not to separate statutory remedies based on the same transaction.’” *Id.*

strict judge agreed with the magistrate judge denying the defendant's motion and stated "the language of Rule 10(b) clearly requires only that claims under 'separate transactions or occurrences' be set forth in separate counts."¹⁵⁶

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 throw-back 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.¹⁵⁷

Some courts recognize that Rule 10(b) motions are almost always improperly based on code practice and slice through them.¹⁵⁸ Other courts fail to recognize the difference and issue code decisions

¹⁵⁶ *Id.* at *3 (stating different legal theories arising from the same transaction or occurrence are appropriate under the federal rule when helpful to understanding the pleading, but separation certainly is not required); see 5A WRIGHT ET AL., *supra* note 11, § 1324.

¹⁵⁷ *Tompkins*, 2009 WL 3836893, at *3 (quoting *Am. Family Mut. Ins. Co.*, 978 F.2d at 292).

¹⁵⁸ *E.g.*, *Rossario's Fine Jewelry, Inc. v. Paddock Publ'ns, Inc.*, 443 F. Supp. 2d 976, 977-78 n.2 (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); *Ciampi v. CCC Info. Servs. Inc.*, No. 05 C 7056, 2006 WL 681049, at *1 (N.D. Ill. Mar. 10, 2006) ("[T]he motion seeks to engraft onto the federal regime of notice pleading a requirement of fact pleading, much as though this action were pending down the street in the Circuit Court of Cook County rather than in this District Court."); *Orthodontic Ctrs. 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 count thus does *not* properly encompass the statement of what is no more than a different theory of recovery on the same claim."); *Eye Care Int'l, Inc. v. Underhill*, 92 F. Supp. 2d 1310, 1313-14 (M.D. Fla. 2000) (discussing complaint on three related contracts that are part of the same transaction or occurrence).

under the federal rule.¹⁵⁹ 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.¹⁶⁰

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:

Sometimes state court code attitudes are so ingrained in attorneys that they attempt to mold federal practice to state practice. “Defendant misquotes Rule 10(b) as providing that ‘separate transactions or separate theories of recovery should be set forth in separate counts.’ This is a misstatement of the rule.” *Perkins v. Sch. Bd. of Pinellas Cnty.*, 152 F.R.D. 227, 229 (M.D. Fla. 1993). “Misstatement” is an understatement.

¹⁵⁹ *E.g.*, *Guth v. Tex. Co.*, 155 F.2d 563, 565-66 (7th Cir. 1946) (stating theories of negligence and breach of contract on the same facts to be stated separately); *Wilshin v. Allstate Ins. Co.*, 212 F. Supp. 2d 1360, 1379 (M.D. Ga. 2002) (explaining tort and contract theories on the same facts to be pleaded in separate counts); *see also* 5A WRIGHT ET AL., *supra* note 11, § 1324 (collecting cases in footnotes seventeen and eighteen and accompanying text).

¹⁶⁰ *See* *Bautista v. L.A. Cnty.*, 216 F.3d 837, 844 (9th Cir. 2000) (Reinhardt, J., concurring). When fifty-one named plaintiffs lost their jobs during the changeover in management of a restaurant, they sued for different forms of discrimination. *Id.* at 839-40. The district court dismissed the second amended complaint with prejudice for failure to plead each plaintiff’s claim in a separate count. *Id.* at 840. This decision was clearly wrong under Federal Rule of Civil Procedure 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. *Id.* at 840-42. The changeover of management was a single transaction or occurrence. *Id.* at 843 (Reinhardt, J., concurring). 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. *Id.* at 841-42, 844 (O’Scannlain, J., concurring in part and dissenting in part). Only one judge seemed to recognize that all plaintiffs were suing on a single set of facts. *Id.* at 842 (Reinhardt, J., concurring). Beyond that, the advantage of handling all plaintiffs together in a single litigation unit was apparent. *Id.* at 844. 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.*

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

. . . .¹⁶¹

As with the other areas where transaction or occurrence is encountered, the proper search is for a common set of facts.¹⁶²

Courts have attempted to get at the meaning of “conduct, transaction, or occurrence” through various glosses, including “core of operative facts,”¹⁶³ “common core of operative facts,”¹⁶⁴ same operational facts,¹⁶⁵ same “factual nexus,”¹⁶⁶ and “gist of the action.”¹⁶⁷ These glosses, since they focus on the facts of the case, are relatively harmless.¹⁶⁸ Yet the question arises again: why any gloss at all? The intent of the rule is that when the proposed amendment arises from the same

¹⁶¹ FED. R. CIV. P. 15(c)(1) (emphasis added). As can be seen, the rule adds “conduct” to the familiar transaction or occurrence. *Id.* This word should broaden the reach of the phrase, but the cases pay little, if any, attention to this addition.

¹⁶² WRIGHT ET AL., *supra* note 11, § 1497 (“As is true in a number of other contexts, such as compulsory counterclaims, crossclaims, and certain third-party claims, the search under Rule 15(c) is for a common core of operative facts in the two pleadings.”).

¹⁶³ *E.g.*, *Mayle v. Felix*, 545 U.S. 644, 659 (2005). The Court also writes of “the same core facts,” *id.* at 657, “[e]ach separate congeries of facts,” *id.* at 661, and “a common core of operative facts,” *id.* at 664.

¹⁶⁴ *E.g.*, *FDIC v. Jackson*, 133 F.3d 694, 702 (9th Cir. 1998); *Perry v. Am. Airlines, Inc.*, 405 F. Supp. 2d 700, 704 (E.D. Va. 2005); *Martin v. Sch. Dist. No. 394*, 393 F. Supp. 2d 1028, 1035 (D. Idaho 2005); *Ruta v. Delta Airlines, Inc.*, 322 F. Supp. 2d 391, 404-05 (S.D.N.Y. 2004).

¹⁶⁵ *E.g.*, *Martin v. Lociccerio*, 917 F. Supp. 178, 184 (W.D.N.Y. 1995).

¹⁶⁶ *E.g.*, *Grattan v. Burnett*, 710 F.2d 160, 163 (4th Cir. 1983); *Farb v. Fed. Kemper Life Assurance Co.*, 213 F.R.D. 264, 267 (D. Md. 2003).

¹⁶⁷ *E.g.*, *Green v. Walsh*, 21 F.R.D. 15, 19 (E.D. Wis. 1957).

¹⁶⁸ *See* WRIGHT ET AL., *supra* note 11, § 1497. Other 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 id.* (collecting and criticizing cases).

facts as the original pleading, the amendment relates back.¹⁶⁹ The best language for expressing that concept is the rule language itself, same “conduct, transaction, or occurrence.”¹⁷⁰

¹⁶⁹ See *supra* note 161 and accompanying text.

¹⁷⁰ FED. R. CIV. P. 15(c)(1)(B); see WRIGHT ET AL., *supra* note 11, § 1497 (stating the 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. “Although 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 11, § 1497 (collecting cases). These courts reason notice preserves the purpose of the statute of limitations to prevent stale claims. *Id.* This reasoning is a straw man. The plaintiff pleads facts that give rise to a claim for relief. 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. FED. R. CIV. P. 15(c)(1)(B). The original complaint places the defendant on notice of the set of facts and all possible legal theories based on that set of facts. See WRIGHT ET AL., *supra* note 11, § 1497. When an amendment meets the standard for relation back, notice to the opposing party should be considered automatic. See *id.*

[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.

Id.

The search for notice appears to trace back to code practice and common law, when a plaintiff was required to set forth the legal theory of a complaint. See *id.* Consideration of notice was then appropriate. See *id.* Today, a plaintiff need only plead a set of facts that may give rise to multiple legal theories. See *id.* Consideration of notice is irrelevant. See *id.* Inserting notice into the ruling sometimes produces the same result. *E.g.*, *Slayton v. Am. Express Co.*, 460 F.3d 215, 228-29 (2d Cir. 2006) (allowing relation back of amendment to render “prior allegations more definite and precise,” even though opining the “central inquiry is whether adequate notice” is 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.3d 857, 866 (D.C. Cir. 2008) (refusing application of relation back to amend the plaintiff’s original complaint that the defendants “conspired to exclude new entrants into the market . . . and had planned preemptively to capture that market by launching their own generic drug” by adding decision not to market own generic drug because the original complaint failed to give notice); *Moore v. Baker*, 989 F.2d 1129, 1132 (11th Cir.

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

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.

Applying this standard, courts have ruled that 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 it may 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 Rule 15(c)(1)(B).¹⁷¹

Courts that look to the facts that form the "conduct, transaction, or occurrence" reach sound results.¹⁷² Courts that treat legal theories as

1993) (refusing to apply the relation back amendment to change theory of recovery from informed consent to negligent performance of surgery and postoperative care in the same surgery, stating the defendant was not put on notice of negligence claims in the original complaint and the plaintiff would have to prove completely different facts than those required to assert the legal theory contained in the original complaint); *see infra* note 178.

¹⁷¹ WRIGHT ET AL., *supra* note 11, § 1497 (footnotes omitted) (collecting cases). Courts have allowed the plaintiff to change a legal theory on the same facts, which sometimes cures a defective complaint. *Id.* § 1497 n.50; *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).

¹⁷² *E.g.*, Tiller v. Atlantic Coast Line R.R., 323 U.S. 574, 581 (1945); U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff, 768 F.2d 1099, 1103 (9th Cir. 1985) (stating a claim for salvage of the second ship as part of the same salvage effort); Grattan v. Burnett, 710 F.2d 160, 163 (4th Cir. 1983) (describing how both theories arose from single termination); Jensen v. Times Mirror Co., 634 F. Supp. 304, 315 (D. Conn. 1986) (adding invasion of privacy theory to defamation theory); *see infra* note 178.

claims botch the result.¹⁷³ 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.

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 certainly one set of facts.¹⁷⁴ One job can interrelate one set of facts

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 Assocs.*, 14 F.3d 114, 118 (2d Cir. 1994) (adding “claims” of waste and breach of contract to “claim” for fraudulent conveyance).

¹⁷³ *E.g.*, *McGregor v. La. State Univ. Bd. of Supervisors*, 3 F.3d 850, 864 (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. Co.*, 215 F.R.D. 645, 652-53 (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 the plaintiff’s attempt to collect damages for a single flood); *Pendrell v. Chatham Coll.*, 386 F. Supp. 341, 345-46 (W.D. Pa. 1974) (refusing to allow the plaintiff to add civil rights violation to complaint for defamation and trespass for same termination because the rule “does not permit lawyers to endlessly answer the question: How many causes of action can you find in this fact situation”).

¹⁷⁴ *E.g.*, *Boone v. Union Carbide Corp.*, 205 F. Supp. 2d 689, 695 (S.D. Tex. 2002) (allowing relation back of the plaintiff’s amendment adding federal law theory to original state law theory on “exact same facts”); *Spillman v. Carter*, 918 F. Supp. 336, 340-41 (D. Kan. 1996) (allowing relation back of the plaintiff’s amendment to add additional theories of recovery to same facts). Defendants opposing plaintiffs’ motions to amend sometimes must not understand the relation back rule. *See, e.g.*, *Boone*, 205 F. Supp. 2d at 694 nn.5-6; *Spillman*, 918 F. Supp. at 340-41.

Unfortunately, sometimes judges do not understand the rule. *See, e.g.*, *Nettis v. Levitt*, 241 F.3d 186, 193 (2d Cir. 2001) (“We see no such abuse in the district court’s determination that plaintiff’s allegations of retaliation based on his objections to [defendant’s] sales tax directives failed to relate back to his allegations in the amended complaint. It is true that both sets of claims concern the same ultimate event Nonetheless, the proposed amendment alleged retaliation based on an entirely distinct set of protected employee activity.”); *Constr. Interior Sys., Inc. v. Donohoe Cos.*, 813 F. Supp. 29, 35-36 (D.D.C. 1992) (refusing relation back of theory based on tortious interference with a contract to refurbish hotel rooms to original complaint for breach of contract to refurbish same hotel rooms even though both are “factually connected” because complaint dealt with terms of contract and amendment dealt with communications with third parties).

even when acts take place over a period of time.¹⁷⁵ One pattern of continuing conduct by a defendant is one set of interrelated facts.¹⁷⁶ One event or deal between the parties is one set of facts.¹⁷⁷ One tortious event is one set of interrelated facts.¹⁷⁸

¹⁷⁵ For example, when a plaintiff sues for discrimination and wishes to amend to add a theory of later retaliation, the amendment relates back. *E.g.*, *Perry v. Am. 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. Univ. of Chi. Hosp.*, 158 F.R.D. 129, 131 (N.D. Ill. 1994) (holding 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, e.g.*, *Jones v. Greenspan*, 445 F. Supp. 2d 53, 56-57 (D.D.C. 2006) (allowing amendment alleging discrimination to original pleading alleging retaliation because “[t]he 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.*, 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 is “substantially different in kind and time”).

¹⁷⁶ *See, e.g.*, *FDIC v. Conner*, 20 F.3d 1376, 1386 (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 loans, foreclosure proceedings, forbearance agreements, and payoff statements”).

¹⁷⁷ *See, e.g.*, *Lind v. Vanguard Offset Printers, Inc.*, 857 F. Supp. 1060, 1068-69 (S.D.N.Y. 1994) (allowing relation back of amendment adding additional omissions and misrepresentations made during negotiation of same agreement); *G & M Oil Co. v. Glenfed Fin. Corp.*, 782 F. Supp. 1085, 1088 (D. Md. 1991) (allowing relation back of amendment adding theory of negligent misrepresentation to original theories all arising out of same loan application).

¹⁷⁸ *E.g.*, *Tiller v. Atlantic Coast Line R.R.*, 323 U.S. 574 (1945). This was recognized by the Supreme Court in the early decision of *Tiller*. *Id.* When plaintiff’s deceased was killed, she sued the railroad under the Federal Employers’ Liability Act. *Id.* at 575. The statute of limitations expired. *Id.* at 580. She moved to amend the complaint to assert violation of the federal Boiler Inspection Act. *Id.* at 575. 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. *Id.* Plaintiff simply changed her theory of recovery, and law is irrelevant to identifying the same conduct, transaction, or occurrence. *Id.*; see also *Ruta v. Delta Airlines, Inc.*, 322 F. Supp. 2d 391, 404 (S.D.N.Y. 2004) (allowing relation back of amendment adding slander theory to seven original theories of recovery all arising from the plaintiff's removal from an airplane); *Bonerb v. Richard J. Caron Found.*, 159 F.R.D. 16, 19 (W.D.N.Y. 1994) (holding a new theory of counseling malpractice arose from the same nucleus of operative facts and so related back to original theory of negligent maintenance of basketball court since the plaintiff was injured in a required exercise program); *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 event arose from the "same core event or transaction"); *Zagurski v. Am. Tobacco Co.*, 44 F.R.D. 440, 443 (D. Conn. 1967) (holding a 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*. *Moore v. Baker*, 989 F.2d 1129 (11th Cir. 1993). The plaintiff sued her surgeon on an informed consent theory. *Id.* at 1131. After the statute of limitations expired, she sought to amend to add allegations of negligence in the surgery and postoperative care. *Id.* 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. *Id.* at 1132. These were "different times and involved separate and distinct conduct," said the court. *Id.* In *Tiller*, the Supreme Court recognized that all allegations arose from one wrongful death. *Tiller*, 323 U.S. at 581. But in *Moore*, the court failed to recognize that all allegations arose from one surgery. *Moore*, 989 F.2d at 1132. 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 notice since the original complaint placed the defendant on notice that the plaintiff was suing on the set of facts surrounding one operation. Second, notice was not a proper consideration. See *supra* note 170. Finally, the court referred to "new claims of negligence." *Moore*, 989 F.2d at 1132. Plaintiff had only one claim: for her injuries caused by one surgery. *Id.* at 1131. *Moore* has done additional damage because it was relied on to reach the same erroneous result in *Simmons v. United States*. *Simmons v. United States*, 225 F.R.D. 688, 693 (N.D. Ga. 2004). But see *Azarbal v. Med. Ctr. of Del., Inc.*, 724 F. Supp. 279, 283 (D. Del. 1989) (recognizing single operation created single claim).

Another case failing to recognize the commonality of a single set of facts is *In re Rationis Enterprises, Inc. of Panama*, in which a cargo claimant was not allowed to

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.¹⁷⁹ In comparison, the “transaction or occurrence” test of various joinder rules serves the purpose of handling all aspects of litigation together to promote economy and efficiency, an objective that is generally agreed to be salutary.¹⁸⁰ Consequently, one might think courts would be more grudging in interpreting the relation back standard than they are in interpreting the similar joinder standards. The opposite is true. Courts are in general more generous in interpreting the relation back standard than the joinder standards.¹⁸¹ 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 the claim and the transaction or occurrence tie together is interlocutory appeal in a case including “multiple claims.”¹⁸² Once again, the task at hand is to define a claim in order to recognize when a case presents multiple claims.¹⁸³

A. *History of Rule 54(b)*

The Federal Rules of Civil Procedure 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.”¹⁸⁴ 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

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. *In re Rationis Enters., Inc. of Pan.*, 45 F. Supp. 2d 365, 367 (S.D.N.Y. 1999).

¹⁷⁹ See *supra* notes 164-73.

¹⁸⁰ See *supra* Part II.A.

¹⁸¹ See *supra* Parts II.B-C, III.C.

¹⁸² FED. R. CIV. P. 54(b).

¹⁸³ See *id.*

¹⁸⁴ See FED. R. CIV. P. 1; see *supra* Parts II.A, III.A.

parties before a final judgment can be had.”¹⁸⁵ 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.”¹⁸⁶ Rule 54(b) thus was an integral part of the procedural system created by the federal rules.¹⁸⁷

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 in part 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.¹⁸⁸

As can be seen, the transaction or occurrence requirement, the keystone of the joinder rules, was also an important part of the rule. Inclusion of the transaction or occurrence requirement indicated that “claim for relief” in the rule was to be interpreted consistently with other joinder and pleading rules. Indeed, Judge Charles E. Clark, the reporter for the advisory committee that drafted the Federal Rules of

¹⁸⁵ *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950); *see also* *Ind. Harbor Belt R.R. v. Am. 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, 943-44 (2d Cir. 1947) (Clark, J., majority opinion).

¹⁸⁶ FED. R. CIV. P. 54(b) (as promulgated in 1938). This part of the Rule is substantially unchanged today. *Compare* FED. R. CIV. P. 54(b) (as promulgated in 1938), *with* FED. R. CIV. P. 54(b) (2009).

¹⁸⁷ *See* *Reeves v. Beardall*, 316 U.S. 283, 285 (1942) (tying the joinder rules together with provisions for severance for trial and appeal in multiple claim cases); *Rieser v. Balt. & Ohio R.R.*, 224 F.2d 198, 205 (2d Cir. 1955) (asserting invalidity of Federal Rule of Civil Procedure 54(b) would be devastating to the “entire rules structure”).

¹⁸⁸ FED. R. CIV. P. 54(b) (as promulgated in 1938) (emphasis added).

Civil Procedure, interpreted Rule 54(b) entirely consistent with his—and the rules’—concept of claim.¹⁸⁹ The Supreme Court concurred.¹⁹⁰

The rule had a major weakness, however. By requiring decision on all claims and counterclaims arising from the same transaction or occurrence prior to appeal, it prevented appeal when an entirely separable counterclaim had been finally decided; it also created uncertainty as to when time to appeal began to run, which meant that in cases of any doubt, an appeal was filed.¹⁹¹ Consequently, Rule 54(b) was amended.¹⁹² 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, crossclaim, or third-party claim” was a separable claim even though it

¹⁸⁹ See *supra* note 25 (discussing Judge Clark’s role on the advisory committee that drafted the Federal Rules of Civil Procedure). Only two years after promulgation of the federal rules, Judge Clark had the opportunity to rule on the proper meaning of “claim” but was unable to convince his other two colleagues on the panel. *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 was a single transaction or occurrence). Seven years later, Judge Clark wrote for a majority of two—still with one judge dissenting—in *Clark v. Taylor*:

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.

Clark, 163 F.2d at 942-43. 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 Court of Appeals.

¹⁹⁰ See, e.g., *Reeves*, 316 U.S. at 285. In *Reeves*, 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.’” *Id.* (quoting *Atwater v. N. Am. Coal Corp.*, 111 F.2d 125, 126 (2d Cir. 1940) (Clark, J., concurring)).

¹⁹¹ See generally 7 WRIGHT ET AL., *supra* note 11, § 2653 (discussing the history behind Rule 54(b)); William J. Serritella, Jr., Note, *Kelly v. Lee’s Old Fashioned Hamburgers: A Step Back from Certainty Under Rule 54(b)*, 41 DEPAUL L. REV. 257, 265-70 (1992) (describing the original and amended Rule 54(b)); *supra* note 11 (discussing the requirement of “transaction or occurrence” for joinder rules).

¹⁹² FED. R. CIV. P. 54(b) advisory committee’s note.

arose from the same transaction or occurrence.¹⁹³ 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.¹⁹⁴ The amendment made no change at all in the requirement that the action include multiple claims.¹⁹⁵ 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.¹⁹⁶

Rule 54(b) does not exist in a vacuum. First, the general rule of appeal from district court to a court of appeals is the final judgment rule.¹⁹⁷ Rule 54(b) is a carefully crafted exception to the final judgment rule.¹⁹⁸ As such, Rule 54(b) should be interpreted strictly and narrowly.

¹⁹³ FED. R. CIV. P. 54(b). The multiplicity of a claim and counterclaim, even though both arose from the same transaction or occurrence, was affirmed in *Cold Metal Process Co. v. United Engineering & Foundry Co.* *Cold Metal Process Co. v. United Eng’g & Foundry Co.*, 351 U.S. 445 (1956).

¹⁹⁴ FED. R. CIV. P. 54(b).

¹⁹⁵ *Compare* FED. R. CIV. P. 54(b) (as promulgated in 1938), *with* FED. R. CIV. P. 54(b) (2009).

¹⁹⁶ FED. R. CIV. P. 54(b). The language allowing appeal in cases involving multiple parties was added by amendment in 1961. *See* FED. R. CIV. P. 54(b) advisory committee’s note.

¹⁹⁷ 28 U.S.C. § 1291 (2000). “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” *Id.*

¹⁹⁸ In 1946, the Advisory Committee’s note to Rule 54(b) stated,

Second, as with other jurisdictional statutes and rules, mechanical interpretation is desirable for certainty.¹⁹⁹ 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.²⁰⁰

B. Misinterpretations of Rule 54(b)

“From the very beginning . . . courts have been confused as to when an action presented multiple claims.”²⁰¹ That statement is almost true. The first interpretation of Rule 54(b) came in *Reeves v. Beardall*.²⁰² 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.”²⁰³ Unfortunately, *Reeves* was an obscure, cryptic opinion that led to much confusion among the courts of appeals.²⁰⁴ Eventually, the lower courts developed two competing tests to identify multiple claims: the “cause

The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. . . . Rule 54(b) was originally adopted in view of the wide scope and possible content of the newly created “civil action” in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the settled federal rule stated above. . . . [Rule 54(b)] re-establishes an ancient policy with clarity and precision.

FED. R. CIV. P. 54(b) advisory committee’s note (1946).

¹⁹⁹ *E.g.*, *Fed. Deposit Ins. Corp. v. Elefant*, 790 F.2d 661, 664 (7th Cir. 1986).

²⁰⁰ *See infra* note 230 and accompanying text. “[Section] 1291 is not a technical rule in a game.” *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 441 (1956) (Frankfurter, J., dissenting). Courts that sidestep the multiple claims requirement of the rule and decide whether to allow the appeal on considerations of judicial administration err. *See infra* note 230 and accompanying text.

²⁰¹ Craig E. Stewart, Note, *Multiple Claims Under Rule 54(b): A Time for Reexamination?*, 1985 BYU L. REV. 327, 332.

²⁰² *Reeves v. Beardall*, 316 U.S. 283 (1942).

²⁰³ *Id.* at 285-86 (quoting *Atwater v. N. Am. Coal Corp.*, 111 F.2d 125, 126 (2d Cir. 1940) (Clark, J., concurring)).

²⁰⁴ Note, *Federal Rule 54(b): The Multiple Claims Requirement*, 43 VA. L. REV. 229, 231 (1957).

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.²⁰⁵ Of these two, the “cause of action” test was obviously wrong, a hold-over from the abandoned code pleading system.²⁰⁶ As for the “factual occurrence” test, courts further created two additional tests: whether the two “claims” required proof by different evidence and whether the central fact pattern differed.²⁰⁷ As with the two main tests, only the second of these two tests was accurate. Thus, of four tests, one held true to the rule.

The Supreme Court entered this confusion in *Sears, Roebuck & Co. v. Mackey*.²⁰⁸ Plaintiff Mackey sued Sears, Roebuck in a complaint containing four relevant counts.²⁰⁹ Count I charged defendant with a violation of the Sherman Antitrust Act impacting three of his business ventures including General Metalcraft, Vascoloy-Ramet, and Time Saver Tools.²¹⁰ Count II incorporated the facts of Count I and detailed the destruction of the General Metalcraft business.²¹¹ Count III charged a common law tort of interference with the Vascoloy-Ramet contract.²¹² Count IV charged a common law tort of unfair competition and patent infringement with Time Saver Tools.²¹³ The district court dismissed Counts I and II, retained Counts III and IV, and “certified” a Rule 54(b) appeal on the “claims” of Counts I and II.²¹⁴ The court of appeals upheld its jurisdiction.²¹⁵

The Supreme Court approved the appeal of Counts I and II as claims separate from Counts III and IV.²¹⁶ The Court praised the 1946

²⁰⁵ See 10 WRIGHT ET AL., *supra* note 11, § 2657; Note, *supra* note 204, at 230.

²⁰⁶ See Note, *supra* note 204, at 231 (discussing the Supreme Court’s support for the factual occurrence test which in essence eliminates the cause of action test).

²⁰⁷ *Id.* at 231-32.

²⁰⁸ *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956).

²⁰⁹ *Id.* at 429-30.

²¹⁰ *Id.* at 430.

²¹¹ *Id.* at 430-31.

²¹² *Id.* at 431.

²¹³ *Id.*

²¹⁴ *Id.* at 429-30.

²¹⁵ *Id.* at 428.

²¹⁶ *Id.* at 436.

amendment to Rule 54(b), with its creation of the 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.²¹⁷ 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.²¹⁸

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 thus might be possible to hold,” and “there at least would be room for argument.”²¹⁹ To be entirely fair, the Court did add a footnote

²¹⁷ *See id.* at 437.

²¹⁸ *Id.* at 436-37.

²¹⁹ *Id.*

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.²²⁰

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.²²¹ Yet *Sears, Roebuck* has been interpreted to stand for the proposition that multiple claims can arise from a common set of facts.²²² Because this is a Supreme Court decision, commentators treat it gingerly.²²³ The decision does not deserve to be treated gingerly. It is a bad decision, one of the worst in the history of the Court.²²⁴ It is just wrong.

Sears, Roebuck has done great damage to the interpretation of Rule 54(b). No other Supreme Court decisions counterbalance it.²²⁵ 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.²²⁶ Based primarily on

²²⁰ *Id.* at 437 n.9.

²²¹ *Id.* at 430, 437 n.9.

²²² 10 WRIGHT ET AL., *supra* note 11, § 2657.

²²³ *E.g., id.* (stating that the opinion does “not significantly clarify the situation”).

²²⁴ The opinion is signed by 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. The opinion gets the date of the adoption of the Federal Rules of Civil Procedure wrong and goes off on “if this” and “if that” tangents. It uses “it could readily be argued here” construction. *See supra* note 219 and accompanying text.

²²⁵ The Supreme Court has examined Federal Rule of Civil Procedure 54(b) only a few times. The first was in *Reeves v. Beardall*. *Reeves v. Beardall*, 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 202-03 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., Note, supra* note 204, at 233. Other Supreme Court decisions have touched only the fringes of the rule. *Cold Metal*, decided the same day as *Sears, Roebuck*, unremarkably concluded a compulsory counterclaim was a separate claim from the original claim. *Cold Metal Process Co. v. United Eng’g & Foundry Co.*, 351 U.S. 445, 452 (1956). *Curtiss-Wright Corp. v. General Electric Co.* reaffirmed that only a final decision on any claim is appealable. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7 (1980).

²²⁶ *E.g., Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1070 (7th Cir. 1981). Judge John Minor Wisdom, sitting by designation on the Seventh Circuit, wrote as follows:

Sears, Roebuck, lower courts from then until today repeat the canard that no satisfactory definition for “claim” exists,²²⁷ assert that a “practical” analysis is needed,²²⁸ and then proceed to add yet another gloss to the rule.²²⁹ 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 relearn the same facts.²³⁰ That lower courts

[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.

Id. 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*].

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. *See generally Cold Metal Process Co.*, 351 U.S. 445 (illustrating the counterclaim made by the defendant against the plaintiff).

²²⁷ *See, e.g., Mitchell v. Rocky Mountain Cancer Ctr.*, 315 F. App’x 725, 728 (10th Cir. 2009); *Okla. Tpk. Auth. v. Bruner*, 259 F.3d 1236, 1242 (10th Cir. 2001).

²²⁸ 10 MOORE ET AL., *supra* note 15, § 54.22[2][b][i].

²²⁹ *E.g., Marseilles Hydro Power, L.L.C. 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); *Se. 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 (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); *Thompson Farms Co.*, 642 F.2d at 1070 (disclaiming “general definition” in favor of “rules of thumb” to identify separate claims).

²³⁰ *See, e.g., Lottie v. W. 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); *Cont’l 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

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)*

One opinion in one Rule 54(b) case begins by asserting that “[t]he appeals are rich with issues, and to discuss them intelligibly we shall have to simplify matters brutally.”²³¹ Even though the judge in that case did not proceed to follow his own admonition,²³² that attitude is precisely what is needed. The courts need to apply two basic principles consistently, 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,”²³³ a pleader asserts a single set of facts.²³⁴ 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

“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). This approach probably traces back to *Curtiss-Wright Corp. v. General Electric Co.*, 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. *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8-10 (1980).

²³¹ *Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1365 (7th Cir. 1990) (Posner, J.); *see also* *FDIC v. Elefant*, 790 F.2d 661, 664 (7th Cir. 1986) (stating the general rule that a contract is one claim, recognizing appellate jurisdiction should be mechanical, and stopping “at the starting place”).

²³² *See Olympia Hotels Corp.*, 908 F.2d 1363.

²³³ FED. R. CIV. P. 8(a)(2).

²³⁴ *See supra* Part III.A; *see also* *Collins v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 83, 87 (2d Cir. 1939) (“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.”).

many laws the deeds violate.”²³⁵ A variant on this definition is: “[C]laims are not separate for Rule 54(b) purposes if the facts they depend on are largely the same, or, stated otherwise, if the only factual differences are minor.”²³⁶ One way of recognizing one claim is by recognizing a single transaction or occurrence.²³⁷ Many cases agree with these variants of the same proposition either explicitly or implicitly in their results.²³⁸ One accident creates one claim.²³⁹ One job action creates one claim.²⁴⁰ One contract creates one claim.²⁴¹

²³⁵ NAACP v. Am. Family Mut. Ins. Co., 978 F.2d 287, 292 (7th Cir. 1992); see Rieser v. Balt. & Ohio R.R., 224 F.2d 198, 199 (2d Cir. 1955) (“[M]ultiplicity 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.”). This language is criticized as “somewhat tautological” in 10 WRIGHT ET AL., *supra* note 11, § 2657, 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.

²³⁶ Minority Police Officers Ass’n v. City of South Bend, 721 F.2d 197, 201 (7th Cir. 1983).

²³⁷ See, e.g., Local P-171, Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co., 642 F.2d 1065, 1070 (7th Cir. 1981) (approving tacitly a definition of different claims as arising from different facts and likening the test to the same transaction (or occurrence)); cf. Acha v. Beame, 570 F.2d 57, 62 (2d Cir. 1978) (accepting generally that “claim” in Rule 54(b) means “one legal right growing out of a single transaction or series of related transactions”).

²³⁸ See, e.g., Soliday v. Miami Cnty., Ohio, 55 F.3d 1158, 1163 (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, 999-1000 (D.C. Cir. 1984) (refusing appeal attempting to separate liability on *respondeat superior* from negligent supervision on same facts); Oyster v. Johns-Manville Corp., 568 F. Supp. 83, 86 (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, Ltd. v. Ballet Theatre, Inc.*, 133 F.2d 187, 189 (2d Cir. 1943). Later applications of the seemingly simple rule leave something to be desired. See *Hudson River Sloop Clearwater, Inc. v. Dep’t of the Navy*, 891 F.2d 414, 418 (2d Cir. 1989) (quoting *Original Ballet Russe* but then proceeding to identify multiple “causes of action” and “claims” arising from building one naval base); *Gottesman v. Gen. Motors Corp.*, 401 F.2d 510, 511-12 (2d Cir. 1968) (quoting *Original Ballet Russe* but then proceeding to identify fourteen “causes of action” arising from the same set of facts).

²³⁹ See *supra* note 235 and accompanying text.

²⁴⁰ See *supra* note 235 and accompanying text.

²⁴¹ See, e.g., *FDIC v. Elefant*, 790 F.2d 661, 664 (7th Cir. 1986).

2. 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 also true; different theories of law based on the same set of facts do not create more than one claim.²⁴² Some courts state the proposition boldly and apply it boldly.²⁴³ Some courts state the proposition boldly and decide on other bases.²⁴⁴ Some courts state the proposition boldly and misunderstand what they have just said.²⁴⁵

²⁴² See *Atwater v. N. Am. Coal Corp.*, 111 F.2d 125, 126 (2d Cir. 1940) (Clark, J., concurring) (“[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.”). Similarly, different types of relief on one set of facts and one legal theory constitute one claim. See, e.g., *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742-43 (1976); *Gen. Acquisition, Inc. v. GenCorp, Inc.*, 23 F.3d 1022, 1029 (6th Cir. 1994) (finding a single aggregate of operative facts arose from a single wrong of takeover).

²⁴³ See, e.g., *Ind. Harbor Belt R.R. v. Am. Cyanamid Co.*, 860 F.2d 1441, 1445 (7th Cir. 1988) (stating the 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, 341 (2d Cir. 1963) (holding since “claim” denotes an aggregate of operative facts, striking two of plaintiff’s three “causes of action” was 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.”).

²⁴⁴ See, e.g., *Cont’l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1525 (9th Cir. 1987) (asserting the 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 Enters., Inc.*, 474 F.2d 200, 202 (5th Cir. 1973) (stating “legal theories of relief are so intertwined as to constitute a single claim”); 10 MOORE ET AL., *supra* note 15, § 54.22[2][b][i] n.47 (collecting cases emphasizing splitting claims for res judicata purposes).

²⁴⁵ See, e.g., *Stearns v. Consol. Mgmt., Inc.*, 747 F.2d 1105, 1109 (7th Cir. 1984) (stating “mere variations of legal theory do not constitute separate claims” and then holding the plaintiff’s complaint on theories of age discrimination and civil rights violations for the same termination involved “separate legal rights” thus constituting separate claims); *Gas-A-Car, Inc. v. Am. Petrofina, Inc.*, 484 F.2d 1102, 1105 (10th Cir. 1973) (recognizing same aggregate of operative facts for both legal theories but concluding facts not “totally identical”).

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).²⁴⁶ Sometimes it leads the court into clear error.²⁴⁷ Such loose use of language is also hard to understand.²⁴⁸ Thinking of legal theories as causes of action—or even as claims—is a throwback to code procedure and common law pleading.²⁴⁹ It should be recognized and eradicated. For

²⁴⁶ See, e.g., *Lowery v. Fed. Express Corp.*, 426 F.3d 817, 820 (6th Cir. 2005) (following a single unfavorable job action, plaintiff brought claims of “race discrimination and retaliation under Title VII and later amended his complaint to add a state law 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”); *Gen. Acquisition*, 23 F.3d at 1029 (recognizing a single wrong and thus a single claim because “all of the causes of action arise out of a single aggregate of operative facts”); *Backus*, 317 F.2d at 339 (identifying a single claim where the plaintiff pled three “causes of action” on the same events).

²⁴⁷ See, e.g., *Steiner v. 20th Century-Fox Film Corp.*, 232 F.2d 190, 193 n.3 (9th Cir. 1956). This early case in the Ninth Circuit doggedly stated that “claim,” as used in Rule 54(b), meant “cause of action.” *Id.* 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.” *Id.* 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. See *id.* The ludicrous statement that claim means cause of action was repeated in other early Ninth Circuit opinions, e.g., *Sch. Dist. No. 5 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*, 279 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.

²⁴⁸ Even the leading treatises on federal procedure require more precision. See 10 MOORE ET AL., *supra* note 15, § 54.22[2][b][i] (stating that “if the causes of action or factual allegations asserted permit only one recovery, only one claim for relief is presented”); 10 WRIGHT ET AL., *supra* note 11, § 2657 (“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.”) (footnotes omitted).

²⁴⁹ See *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 291-92 (7th Cir. 1992):

proper interpretation of Rule 54(b)—as well as all other federal rules—federal judges must eliminate cause of action code thinking from their lexicon.

D. Deciding an 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,²⁵⁰ 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 to 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.²⁵¹ 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.²⁵² These courts not

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.

²⁵⁰ See *supra* Part IV.C.

²⁵¹ See, e.g., *Edney v. Fid. & Guar. Life Ins. Co.*, 348 F.2d 136, 138 (8th Cir. 1965) (stating that "separate claims can exist only where there are 'differing occurrences or transactions, which form the basis of separate units of judicial action'"); *Gen. Constr. Co. v. Hering Realty Co.*, 312 F.2d 538, 540 (4th Cir. 1963) ("The Construction Company is not pressing a number of separate claims . . . but a single claim of two parts."); *CMAX, Inc., v. Drewry Photocolor Corp.*, 295 F.2d 695, 696 (9th Cir. 1961); *Arnold v. Bache & Co.*, 377 F. Supp. 66, 67 (M.D. Pa. 1973).

²⁵² See, e.g., *Lowery v. Fed. Express Corp.*, 426 F.3d 817, 822-23 (6th Cir. 2005) (recognizing when the plaintiff sued on three theories arising from the same

only make hard work of easy cases, but also multiply the 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. Other courts publish many opinions where they fail to recognize this basic principle.²⁵³ Others wrongly engage in parsing a single set of facts to find multiple claims.²⁵⁴

termination, all three “claims” or “causes of action” arose from the same aggregate of operative facts, but then retreated to abuse of discretion in finding no just reason for delay); *Lottie v. W. Am. Ins. Co.*, 408 F.3d 935, 939-40 (7th Cir. 2005) (denying appeal on judicial administration considerations after bouncing back and forth between “claim” and “claims” when plaintiff sued on three theories for denial of insurance for two fires); *Sussex Drug Prods. v. Kanasco, Ltd.*, 920 F.2d 1150, 1154-56 (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 Specialpraeparater v. I.M.C. Chem. Grp., Inc.*, 725 F.2d 1140, 1141-42 (7th Cir. 1984) (finding five counts in the complaint constituted only one claim, but adding dicta that one part of the facts might have constituted a separate claim had the allegations been different).

²⁵³ 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 they “depend upon the violation of separable constitutional rights”); *Hudson River Sloop Clearwater, Inc. v. Dep’t of the Navy*, 891 F.2d 414, 418 (2d Cir. 1989) (holding that even though all of plaintiffs’ theories arose from one proposed naval base, the “causes of action” remaining in the 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) (applying wrong abuse of discretion standard of review to the district court’s decision that two of the plaintiff’s fourteen “claims” arising from the same facts against the defendant were separate based on the “factual *and* legal issues involved”) (emphasis added); cf. *Wood v. GCC Bend, LLC*, 422 F.3d 873 (9th Cir. 2005). The plaintiff asserted three theories of recovery for a single termination. *Wood*, 422 F.3d at 875. The appeals court opined that in a routine employment discrimination case such as this one, “it is typical for several claims to be made.” *Id.* at 879. 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.*

²⁵⁴ See, e.g., *Stearns v. Consol. Mgmt., Inc.*, 747 F.2d 1105, 1109 (7th Cir. 1984) (stating 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,

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 occurrence.²⁵⁵ 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.²⁵⁶

The goal of rules of procedure is to draw all factually related matters into a single action that can conveniently and efficiently be resolved in one case.²⁵⁷ “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 Clark referred to as litigation in a single envelope, defined transactionally.”²⁵⁸ Certainly a holistic unity ties all the joinder rules together through the “transaction or occurrence” to

while the reverse is true of her ADEA claim”); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 702-03 (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. Am. 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. Publ’ns Int’l Ltd.*, 292 F.3d 512 (7th Cir. 2002). The result is supportable as an appeal of a case involving an injunction, 28 U.S.C. § 1292(a)(1) (2006), but the court erroneously concluded 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.” *Ty, Inc.*, 292 F.3d at 516.

²⁵⁵ See *infra* Part V.

²⁵⁶ See *supra* note 25.

²⁵⁷ See *supra* note 25.

²⁵⁸ Freer, *supra* note 69, at 813 (citations omitted).

handle all parts of a single dispute together at one time.²⁵⁹ A single set of facts arising from one dispute is one “unit of judicial action.”²⁶⁰ This 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.²⁶¹ Writing on the subject of permissive joinder of parties, one leading commentator recognizes this unity:

[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.²⁶²

²⁵⁹ See *Lesnik v. Pub. Indus. Corp.*, 144 F.2d 968, 973 (2d Cir. 1944). “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.” *Id.*; see *supra* Part II.A.

²⁶⁰ Bone, *supra* note 29, at 103 n.349. “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.’” *Id.* (citing CLARK, *supra* note 10, § 19, at 143).

²⁶¹ See *Atwater v. N. Am. Coal Corp.*, 111 F.2d 125, 126 (2d Cir. 1940) (Clark, J., concurring) (“[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) [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].”).

²⁶² MOORE ET AL., *supra* note 15, § 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 the preclusion doctrine, Restatement (Second) of Judgments section 24 provides claim preclusion includes “all or any part of the

The litigative unit, according to the federal rules, and all rules systems, is the claim. 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.²⁶³ The policies of convenience, economy, and efficiency behind the rules are the same.²⁶⁴ Some courts and commentators recognize that the rules should be interpreted the same.²⁶⁵ We should recognize 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 the number 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.

RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (1980). “In general, the expression connotes a natural grouping or common nucleus of operative facts.” *Id.* § 24 cmt. b. The 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.” *Id.* § 24 cmt. c, reporter’s note. “[T]ransaction’ 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” *Clark v. Taylor*, 163 F.2d 940, 942-43 (2d Cir. 1947).

²⁶³ See *supra* Parts II.A, III.A.

²⁶⁴ See *supra* Parts II.A, III.A.

²⁶⁵ See *Musher Found., Inc. v. Alba Trading Co.*, 127 F.2d 9, 12 (2d Cir. 1942) (Clark, J., dissenting) (“Narrow views . . . may lead not only 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 69, at 817 (finding “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 . . .

interlocked and unitary system of the federal rules and see the forest for the trees.

arise from the same transaction or occurrence . . . ”); MOORE ET AL., *supra* note 15, § 20.05[2] (stating, “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 the Restatement (Second) of Judgments:

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.

RESTATEMENT (SECOND) OF JUDGMENTS ch. 3, topic 2, tit. D, intro. note (Tentative Draft No. 5, 1978).