



89-R-99001

**FILED**

**OCT 16 2020**

**OFFICE OF THE CLERK  
SUPREME COURT  
COURT OF APPEALS**

**ANDY LOWRY**  
t: (601) 965-8164  
f: (866) 849-8954  
e: alowry@balch.com

October 14, 2020

The Honorable D. Jeremy Whitmire  
Clerk of Appellate Courts  
Post Office Box 249  
Jackson, Mississippi 39205

**Re: Request for Comments on Proposed Amendment to M.R.C.P. 13**

Dear Mr. Whitmire:

I appreciate the public request from the Supreme Court's Rules Committee on Civil Practice and Procedure for comments on its proposed amendment to M.R.C.P. 13, specifically Rule 13(f) on omitted counterclaims. This letter makes two suggestions.

First, to save trouble down the road, the Court may wish to take the opportunity, while addressing omitted counterclaims, to resolve in advance an issue that has been disputed in other courts: When a defendant files an answer with counterclaim, and later amends the answer without desiring to amend the counterclaim, must the counterclaim be re-pleaded in the amended answer, or else forfeited? Or does the original pleading of the counterclaim remain in effect?

Some cases taking the first approach are *Gen. Mills, Inc. v. Kraft Foods Global, Inc.*, 495 F.3d 1368, 1380 (Fed. Cir. 2007); *Penn. Nat'l Mut. Cas. Ins. Co. v. Snider*, 996 F. Supp. 2d 1173, 1180 n.8 (M.D. Ala. 2014); *Bremer Bank, Nat'l Ass'n*, 2009 WL 702009, at \*12 (D. Minn. Mar. 13, 2009). Other cases, taking the second approach, include *Performance Sales & Mktg. LLC v. Lowe's Cos.*, 2013 WL 4494687, at \*3 n.2 (W.D.N.C. Aug. 20, 2013); *Ground Zero Museum Workshop v. Wilson*, 813 F. Supp. 2d 678, 705-06 (D. Md. 2011) (citing cases); *Dunkin' Donuts, Inc. v. Romanias*, 2002 WL 32955492, at \*2 (W.D. Penn. May 29, 2002). The issue is briefly discussed in *Jeffrey Jackson et al.*, *Miss. Civil Procedure*, section 7:4 n.13 (2019 ed.).

While my personal view is that forfeiting a counterclaim is both illogical (because it is distinct from the answer) and harsh, this may be an instance where it is more important that the rule make the issue

The Honorable D. Jeremy Whitmire

October 14, 2020

Page 2

clear one way or another, so that the Bar and public are on notice. An ounce of foresight, in the rule text or in the advisory committee's note, might be worth a pound of adjudication later down the road.

Second, the federal rules made the leap to "counterclaim," no hyphen, some time back. This form also seems to reflect the Court's current usage. See, e.g., *Mann Agency, LLC v. Miss. Dep't of Pub. Safety*, No. 2019-CA-00156-SCT, para. 23 (Sept. 24, 2020); *In re Enlargement & Extension of Municipal Boundaries of City of Petal*, No. 2019-AN-00639-SCT, para. 10 (Sept. 10, 2020); *Waste Mgmt. of Miss. Inc. v. Jackson Ramelli Waste LLC*, No. 2018-CT-00164-SCT, para. 11 (Sept. 3, 2020). Legal-usage maven Bryan Garner also favors doing away with the hyphen, in his *Dictionary of Modern Legal Usage*, 2d. ed. (entry for "counterclaim").

Perhaps this is a good time to omit the hyphen and use "counterclaim" in Rule 13 and anywhere else "counter-claims" are mentioned in our Rules. Even the Advisory Committee Note eschews the hyphen.

My thanks to the Committee for its kind attention to these suggestions.

Sincerely,

BALCH & BINGHAM LLP

Andy Lowry

AL:pf